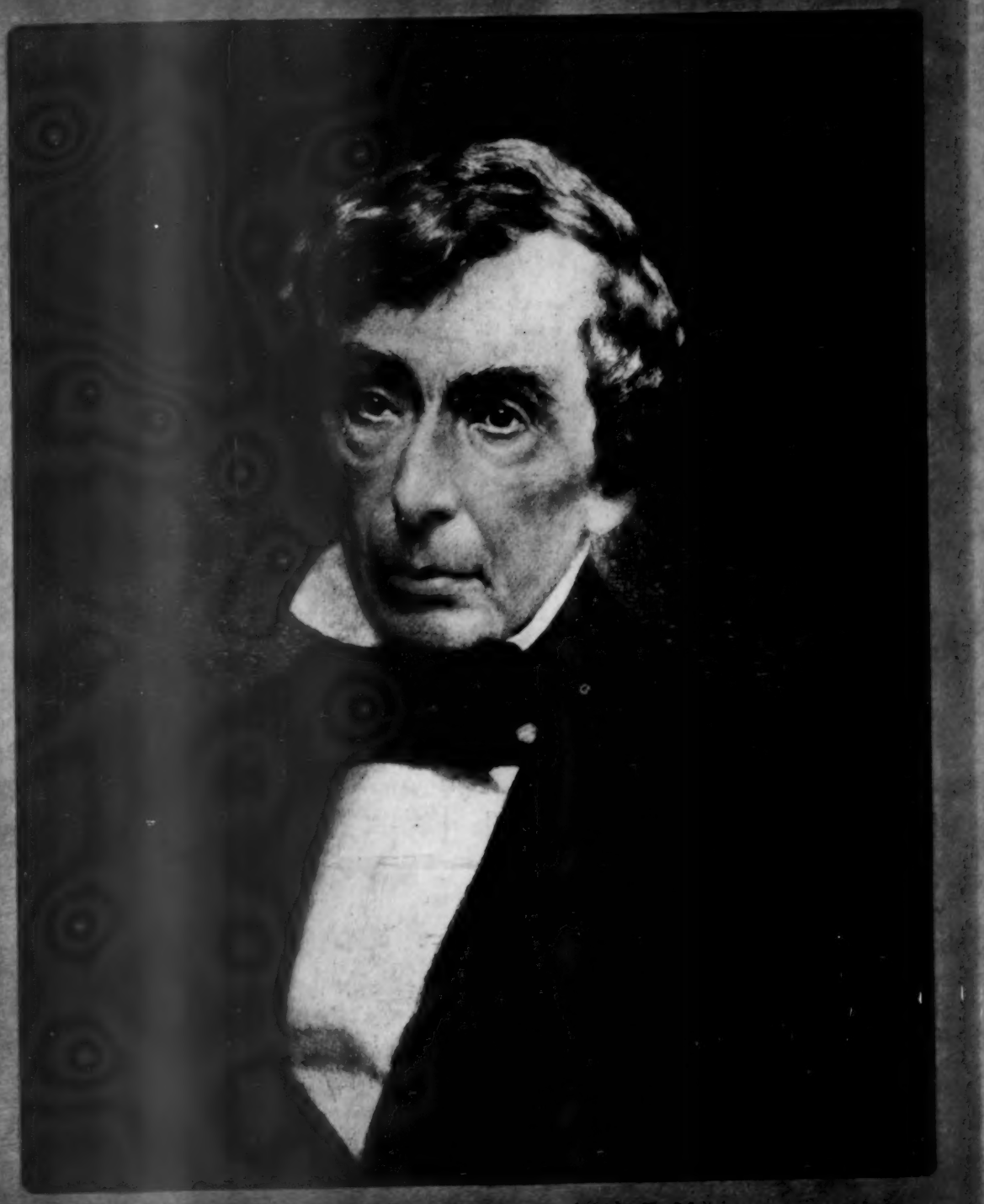

ROGER B. TANEY

AMERICAN BAR ASSOCIATION JOVRNAL

August 1941

1 "Sure glad to see you, Jim. Insurance? Do you specialize in the sale of one kind of insurance?"

2 "No,—all kinds—and I don't want business, Buck, just because I'm a friend of yours but I do want to show you how my background and training may be valuable to you on insurance matters."

3 "I wanted to get the best available training I could, so I went to the Travelers School in Hartford to study the fundamentals of the Casualty and Surety business."

4 "Oh! By the way I do have an insurance problem, Jim—it's bothered me for some time. It concerns Fidelity losses. Maybe you can help me?"

5 "I carry a schedule bond. I can't seem to pick out the right employees to cover. The one loss I did have was caused by an employee that I didn't think needed any coverage—so he wasn't listed. Just how can I get coverage on my entire staff without having it cost too much?"

6 "Well, let's go over this work sheet and get your employees properly classified. The bond I am thinking of will cover your entire staff automatically for a fixed annual cost and will give you the same employee investigation service you are now receiving. What you need, Buck, is a Fidelity Blanket Bond."

Employers are interested in the Fidelity Blanket Bond. If you need selling assistance call a Travelers Bond man for further information.

THE TRAVELERS INDEMNITY COMPANY

HARTFORD, CONNECTICUT

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TABLE OF CONTENTS

"In This Issue" IV

Chief Justice Harlan F. Stone 469
Henry M. Bates

Associate Justice James F. Byrnes 475
Frank J. Hogan

Associate Justice Robert H. Jackson 478
Hon. William L. Ransom

American Justice 482
Hon. Jacob M. Lashly

Notice by Board of Elections 484

Constitutional Powers of the President 485
Edward H. Foley, Jr.

Chief Justice Taney 490

Public Service by the Bar 492
Elihu Root

Editorials 494

Current Legal Periodicals 496
Kenneth C. Sears

Books Received 498

Plans for the New Rules of Criminal Procedure .. 499
James J. Robinson

London Letter 501

Washington Letter 503

Current Events 505

Bar Association News 506

Junior Bar Notes 508

Proposed Amendments to Constitution and By-Laws 509

Tentative Program—Sixty-fourth Annual Meeting 513

Hotel Accommodations 522

The Drafting of Wills 523
W. Barton Leach

Annual Conference of the Fourth Judicial Circuit 524
Will Shafroth

IN THIS ISSUE

Supreme Court Appointments. The October Term of the Supreme Court will witness a rare occasion in the history of the Supreme Court; namely, the induction of a new Chief Justice and two Associate Justices at the same term. The JOURNAL recognizes its special responsibility to provide the Bar of the country with an adequate record or memorial of such an important event in the history of American Law. Accordingly, this issue is largely devoted to the new court appointments. Dean Bates has written a scholarly study of the judicial career of Chief Justice Stone. Mr. Frank Hogan and Judge William L. Ransom (both ex-presidents of the Association and both intimate friends of the men of whom they write) have written respectively about Associate Justice Byrnes and Associate Justice Jackson. The JOURNAL has secured the favorite photograph of each of the new appointees and these pictures also appear in this issue. Finally, the leading editorial discusses the significance of the recent changes in the personnel of the Court.

Our Cover. Roger Brooke Taney, whose likeness appears on the cover of this issue, was the fifth Chief Justice of the United States. His appointment was confirmed by the Senate March 15, 1836, and he served until his death October 12, 1864, a period of over 28 years.

Chief Justice Marshall was the subject of many portraits, so much so that the selection of a suitable one for reproduction on the June cover required considerable thought and discussion. The selection of a picture of Taney for our cover has been difficult for the opposite reason; there are few good pictures of him available except those which show him in his extreme old age. The picture on the cover is a reproduction of an engraving owned by Mr. Thomas Benjamin Gay of Richmond, Virginia, Chairman of the House of Delegates and member of our Board of Editors.

Foreign Affairs and Presidential Powers. Ever since the beginning of our government, the Senate (and to a lesser extent Congress itself) has endeavored to assert a co-equal control with the President over the conduct of foreign affairs. This is probably a natural result in spite of the fact that the Constitution gives a dominating position to the President in this respect. John Quincy Adams, in his Memoirs, discusses this struggle of the Senate, and tells of Washington's first experience with Senate members in regard to foreign affairs. Washington paid a courteous visit to the Senate Chamber to get, *in advance*, the "advice of the Senate" about a certain treaty which he was negotiating. The resulting incident laid down the traditional procedure of the Executive which has been followed ever since. Adams tells us that:

> When Washington left the Senate Chamber, he said he would be "damned" if he ever went there again. And ever since that time treaties have been negotiated by the Executive *before* submitting them for the consideration of the Senate.

The article by Mr. Foley in this issue on "Some Aspects of the Constitutional Powers of the President" discusses this question on a purely legal and historical basis.

CHIEF JUSTICE HARLAN F. STONE

By HENRY M. BATES

Dean Emeritus, University of Michigan Law School

WHEN Chief Justice Hughes retired on June 30, 1941, he laid down as heavy a burden as had been carried by any Chief Justice. During his term a highly critical situation developed, which was due to a number of causes. Most fundamental among these was the acute and all-pervasive change in our life —economic, political, and social—which had reached dimensions and intensity creating an irresistible demand for an enlargement of the scope of governmental action.

The undoubted need for a freer interpretation of the Constitution than had prevailed for some decades was accentuated by a rising popular opinion, developing legitimately from needs which could not be denied, but also in part from a hyper-critical and in many respects unfair and ignorant criticism of the courts, with the Supreme Court bearing the brunt of the attack.

Only a man of exceptional intellectual vigor, of imagination and resourcefulness, of broad experience contributing to a sound and realistic understanding of contemporary life, could have guided the Court through the troubled years of the last decade, meeting the legitimate needs for some change in standards of interpretation, of legislation and the Constitution, and yet without surrender of the dignity and authority of the Court.

Chief Justice Hughes accomplished his difficult and delicate task with an extraordinary degree of success which will make certain his high rank, even among the most illustrious of our justices. The great achievement of the retired Chief Justice plus the fact that although the present climax of difficulties has been passed, the Court is still in troubled waters and that another highly critical period is probably just ahead, made the choice of an adequate successor extremely important. The nomination by the President was awaited with anxiety, not only by the bar, but by that part of the nation which was sufficiently informed and intelligent to appreciate how dangerous and perhaps destructive would have been the appointment of any man with less than the very highest qualifications.

Fortunately, the choice of the successor made by President Roosevelt for this highly important post has been greeted with substantial unanimity throughout the country. It was the best possible selection that could have been made. No other man in the country possesses such a combination of exceptional vigor and clarity of mind, broad and varied experience in private practice, in legal scholarship as professor and dean in a great law school, administrative experience both as law school dean and as Attorney General of the United States, and finally as Associate Justice of the Supreme Court for sixteen years, as that which the new Chief Justice brings to his great office.

It would be superfluous to point out that other qualities in addition to those which have been mentioned—such as temperament, trends of thinking, and a sensitive and accurate appreciation of the conflicting claims which come before a court, and of the economic and social needs of the country—are absolute requirements for a great Chief Justice in this period. A study of the career of the new Chief Justice, especially, of course, of his opinions as an Associate Justice, his acts as Attorney General, his numerous writings, justifies the belief that Chief Justice Stone will meet the requirements of his high office, not only adequately, but with such a high degree of sound judgment, keen perception, and statesmanship as to assure the country that a completely adequate successor has assumed the mantle of the great Chief Justice who has just retired.

It is impossible within the space limit of this article, to do more than mention the more important of the varied experiences and services in the full and influential career of the new Chief Justice. Nor can there be anything like adequate analysis of the many opinions which he has written. The most that will be attempted here is to lead the reader who is not a specialist in any of the fields covered, along the paths which Mr. Justice Stone has followed in the development of his standards of interpretation and his thinking about those constitutional problems which have been so much to the fore since he went to the Supreme Court in 1925.

A striking and gratifying fact about his judicial career is that he was a finely rounded lawyer, exceptionally well equipped to perform judicial functions the very day he took the oath of office as Associate Justice. While his knowledge of law, particularly that part of it which we call public law, has been widened and his wisdom has been matured since then, it is nevertheless true that he entered upon his duties as judge far better equipped than many of the fine men who have sat on that bench, able as they were. It was not necessary that he begin falteringly or spend years in being educated to the high performance of his duties. He was inducted into his office on March 2, 1925, and first heard arguments of counsel three days later. On April 13 he delivered three opinions in cases which had been argued on March 5, only a little more than a month earlier: *May v. Henderson*, 268 U. S. 111; *U. S. v. Dunn*, 268 U. S. 121; and *Stebbins v. Riley*, 268 U. S. 167. These were important cases and involved various topics in the law of bankruptcy, evidence, trusts, estoppel, constitutional law, and taxes. The opinions were well

Chief Justice HARLAN F. STONE

written, clear, logical, and carefully considerate of the arguments advanced by counsel. They were the work of a finished lawyer, devoid of ambiguities, and evinced fine legal technique. And those are the characteristics of all of his opinions, both those for the Court and those in dissent. From that time on he has more than carried his full share of the exacting work of our highest tribunal.

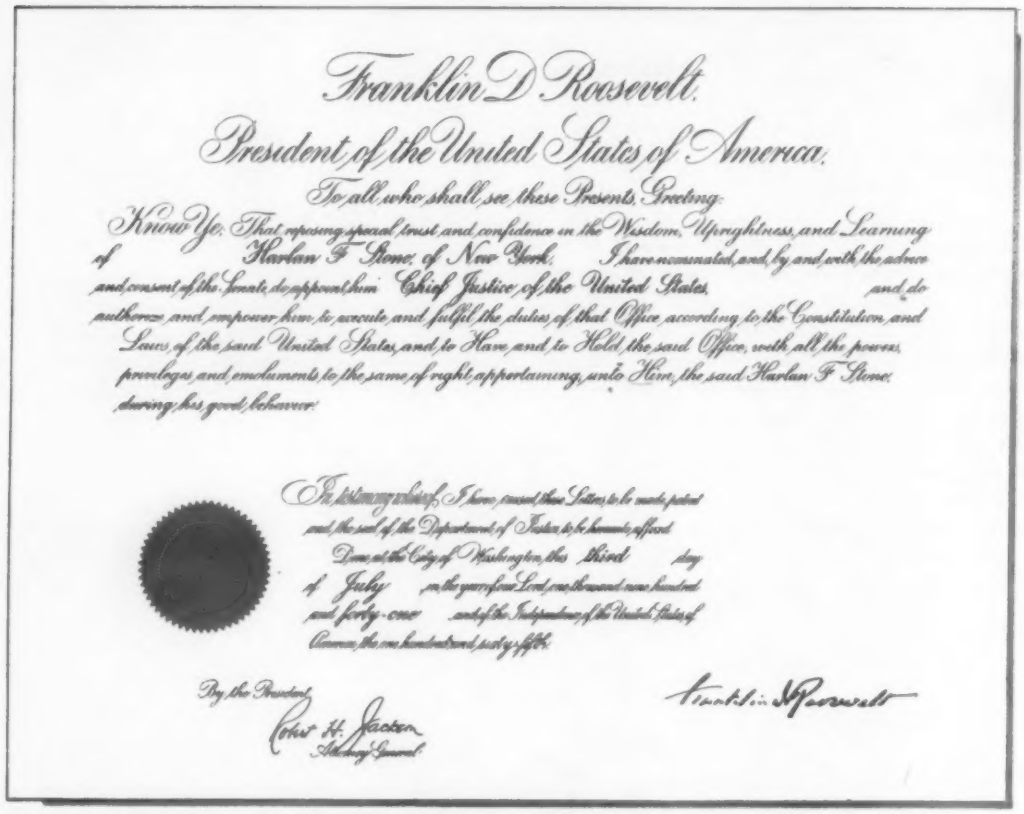
Very able men constituted the Supreme Court at the time of Justice Stone's appointment. Upon some topics, particularly in the field of constitutional law, there were wide differences of opinion among them. Justices Holmes and Brandeis were well known to be at opposite poles from Justices Sutherland, Butler, and McReynolds. Seven years later, Justice Cardozo, then beginning his all too brief career upon the same Court, generally was found in agreement with Holmes and Brandeis. Justice Stone, from the beginning of his judicial career, was guided by the standards and methods of constitutional and statutory interpretation which influenced the judicial thinking of the group of which Justice Holmes was the senior member. Justice Stone unquestionably owes much to his association with Holmes and Brandeis. No doubt each member of the bench finds his own ideas and judgment rectified or enriched and clarified by conference with all of his colleagues, but the thinking of Mr. Justice Stone in constitutional law is obviously along the same lines as those followed by Holmes and Brandeis and later by Cardozo. But it is certain that Justice Stone made his own contribution to these and the other members of the bench on which he has now served for more than sixteen years. And no one who reads his opinions carefully can doubt for a moment that while he has felt the benefit of the reciprocal influences of his colleagues, one upon the others, he has reached his own conclusions in individual cases and equally in the method of his approach to the solution of litigated problems in his own independent way.

A brief statement of the important experiences in the life of Chief Justice Stone, while well known to any who may read this article, may be worth while by way of pointing out the source of much of his pre-eminent fitness for his new work. Born in New England and with the impress of the New England philosophy of life still strong upon him, Harlan Stone, after graduation at Harvard College and the Columbia Law School, began practice in an important law firm which, by his admission to partnership after three years of service as a clerk, became the firm of Satterlee, Canfield, and Stone. During the years just indicated he was an active member of the Columbia University law faculty, and became the Dean of the Law School in 1910.

He was the able and constructive Attorney General of the United States in 1924-25. His experience as a practicing lawyer, among whose clients were some of the most important corporations of the country, has given him an intimate understanding of "big" corporations and business practice generally. This is clearly revealed in some of his opinions as Associate Justice, in which the often intricate and camouflaged maneuvers of corporations are exposed to view and analyzed with a clarity which is exceptional. His work as a professor of law has likewise contributed greatly to his understanding of the problems which come before the Supreme Court. His courses in the Columbia Law School chiefly concerned equity, property, and securities; and his profound knowledge of those subjects is clearly apparent in his opinions.

Of greater public interest and of more profound influence upon the institutions of the country are the questions of constitutional law which come before the Court, and the standards and method of approach to their solution which Mr. Justice Stone brought to the performance of his duties as Associate Justice and will now employ as the presiding officer of the Court. Three main assumptions underlie all of the new Chief's opinions in this field. He has made them crystal clear, and already they have been greatly influential in moulding and in some cases determining the development of constitutional doctrine in this acutely transitional period. These postulates or theories of the new Chief Justice are:

(1) The determined insistence upon the limits placed upon judicial action in a government like ours, whose powers and functions are distributed into three separate and coordinate departments. Thus, for example, he has said over and over again that the sole question for the Court in passing upon the validity of legislation by Congress, or by the state legislatures, is that of granted power. When a given legislative act is passed, if authority to deal with its subject matter is granted expressly or by legitimate implication, then the act cannot be declared invalid by reason of alleged prohibitions deduced from such generalized standards of government as the due process clauses. Questions of wisdom, expediency, or meticulous claims of unfairness are not for the Court. This, of course, is familiar doctrine and has been declared countless times by the Supreme Court, almost from the beginning of our life under the present constitution. But many opinions of the Court can be pointed to in which this limit on judicial power is vigorously declared, despite which the decisions are, in the constitutional psychology now prevailing, based in reality upon legislative considerations or, as it is sometimes said, by the personal views of the judges as to the wisdom, reasonableness, or efficacy of the challenged acts. One may freely and fully accept as binding these restrictions upon judicial power without accepting as fair some of the criticisms which have been levelled at the Court for decisions made during the last four or five decades. It is impossible for a man, no matter how white the ermine he wears, to divorce himself entirely from his beliefs in matters economic, political, or social, in the broad sense in which the latter term is commonly used. This has been eloquently and convincingly set forth by the late Mr. Justice Cardozo in his very important "The Nature of the Judicial Function." Current



Franklin D Roosevelt,
President of the United States of America,
To all who shall see these Presents, Greeting:
Know Ye, That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Harlan F Stone, of New York, I have nominated, and by and with the advice and consent of the Senate do appoint him Chief Justice of the United States, and do authorize and empower him to execute and fulfil the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges, and emoluments to the same of right appertaining, unto Him the said Harlan F Stone during his good behaviour.
In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.
Done at the City of Washington, this third day of July in the year of our Lord one thousand nine hundred and forty-one and of the Independence of the United States of America the one hundred and sixty-fifth.
By the President,
Robert H. Jackson
Attorney General
Franklin D Roosevelt

From photographic reproduction furnished through kindness of Mr. Cropley, Clerk, Supreme Court.

opinions in Supreme Court cases will make this statement abundantly clear.

But unquestionably during the period of intense industrial growth through which we have been passing certain conceptions regarding economic matters have become fixed and have sometimes exercised undue influence upon the minds of very able and conscientious judges. To the late Mr. Justice Holmes more than to anyone else is due the recognition of the tendency just mentioned and its correction. From the very beginning of his judicial career the present Chief Justice accepted as sound the restrictive view of the judicial function which Holmes had brilliantly revived. Perhaps there is no better expression of the new Chief's theory about this than that in his dissenting opinion in *U. S. v. Butler*, 297 U. S. 1, 87, as follows:

"The suggestion that it (the legislative power) must now be curtailed by judicial fiat because it may be abused by unwise use hardly rises to the dignity of argument. So may judicial power be abused. 'The power to tax is the power to destroy' but we do not, for that reason, doubt its existence, or hold that its efficacy is to be restricted by its incidental or collateral effects upon the states . . .

"Such suppositions are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action. Courts are not the only agency of government that must be assumed to have the capacity to govern. Congress and the courts both unhappily may falter or be mistaken in the performance of their constitutional duty. But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction is far more likely in the long run 'to obliterate the constituent members' of 'an indestructible union of indestructible states' than the frank recognition that language, even of a constitution, may mean what it says . . . ."

Mr. Justice Stone has adhered scrupulously to this conception of the important limitation upon the scope of judicial authority in passing upon the validity of legislation. That will account for his having refused to hold invalid legislation which is sincerely and vigorously condemned by many people. Without professing to have any knowledge of the Justice's personal views regarding the wisdom, efficacy, or even fairness of the legislation passed upon by the Court during his time, one may hazard the guess that he has felt obliged, not to approve, but to refuse to hold unconstitutional some legislative acts which have come before the Court.

(2) A second fundamental theory regarding the structure and functioning of our government which stands out in many of the opinions written by Mr.

Justice Stone relates to the dual form of our government. There is, of course, no other constitutional scheme quite like ours. It is not conceivable that any group of men as able and wise as those who framed our present federal constitution would have planned a governmental scheme identical with that under which we now live, had there not been conditions and circumstances growing out of the history of the colonies and the thirteen original states which made impossible a consolidated integral sovereignty and government or the development of a federation wholly comparable to any other known to history.

The independence of each other possessed by the colonies accounts for the dual nature of our governmental scheme and for the untenable theories of state and federal sovereignty which prevailed all through the early history of the nation. Whether divisible or not, an attempt was made to divide sovereignty and, of course, the concept of absolute sovereignty is an abstraction which probably could not accurately be said to have been the attribute of any nation or government of which we have any knowledge.

Mr. Justice Stone seems to the writer to have comprehended and more completely and satisfactorily stated the relation of our states and state governments to the nation and the federal government than anyone else. He has pointed out that we do not have an incomplete national sovereignty, neatly dovetailed or meshed into partial state sovereignties, each being completely independent and exclusive of the other. More simply and therefore more clearly perhaps than it has been put by anyone else, Mr. Justice Stone has explained our governmental scheme as a dual one of national and state governments, not mutually independent of each other, but so constructed as to provide for both national and local needs, with powers often seemingly overlapping and designed to make a practical working scheme of government. This common sense view of our governmental structure clarifies our political air which had been somewhat beclouded with metaphysical theories of sovereignty and the distribution of governmental powers. This theory of Mr. Justice Stone accounts clearly for many of his opinions and votes on interstate commerce matters, on federal and state taxation, with related problems concerning the immunity of governmental instrumentalities from federal or state taxes, as the case may be.

The change of attitude and accepted theory of the Court, for which Mr. Justice Stone is largely responsible, bids fair to contribute to the satisfactory solution of some interstate commerce problems which the Supreme Court has not convincingly dealt with heretofore. The Stone conception of the relationship of national and federal governments is not wholly new or original. It is, however, the clearest, soundest, and most common sense determination of this practical problem which we have had. Mr. Justice Stone's view is brought out strikingly in his dissenting opinion in the case of *Di Santo v. Pennsylvania*, 273 U. S. 34. In that case he urged the acceptance of a practical solution of the problem to be derived from a consideration of the probable effects of a claimed interference by state regulation of the business of selling steamship tickets in foreign as well as in purely intrastate travel. Accepting all of Mr. Justice Brandeis' reasoning in the latter's dissenting opinion, Mr. Justice Stone urged that for the wholly unsatisfactory test of direct or indirect interference with interstate foreign commerce, there be substituted a practical consideration as to whether the state statute complained of was or was not local in its incidence and whether the effect upon commerce in reality infringed upon the national interest.

The same method of factual analysis for the purpose of determining how a statute will actually affect the situations to which it is to be applied is Mr. Justice Stone's approach to the decision as to the validity of a tax imposed by one government upon the property, functions, or services which may have effect upon or relationship to the functions of the other government. The basic case dealing with this problem is, of course, *M'Culloch v. Maryland*, 4 Wheat. 316. The tax imposed by Maryland involved in that case would unquestionably have been burdensome upon the Bank of the United States in its performance of governmental functions. The decision might have been based upon that fact. But the Chief Justice, after pointing out the difficulty of determining how burdensome a state tax might be upon the national government, declared that "the perplexing inquiry, so unfit for the judicial department, is what degree of taxation is the legitimate use, and what degree may amount to the abuse of power," and based the decision upon an implied exception to the power of the states to tax in such cases, on the ground that the institutions of the United States are "constructively without the local territorial jurisdiction of the individual states in every respect and for every purpose." In other words, the theory adopted by the Court was that the states could not tax institutions or functions of the federal government no matter what the extent of the burden, if any, upon the government of the United States. Fact inquiry was deemed unnecessary and, therefore, precluded.

No one today doubts the correctness of the decision, but the unnecessarily broad statement referred to above has until very recently been accepted as the adequate reason for prohibiting any tax by the states upon federal institutions or functions; and the converse, of course, followed logically. The first effective challenge to this broad doctrine came in 1926 in the case of *Metcalf v. Mitchell*, 269 U. S. 514, in an opinion written by Mr. Justice Stone. The reasoning of the Court in the Metcalf case was wholly different from that in *M'Culloch v. Maryland*. Instead of adopting a theory of sovereignty of the states and of the federal government as the basis for decision, Mr. Justice Stone argued that the matter should be determined upon a practical consideration of the effect, if any, of the challenged tax

upon the functions of the government of the United States. He said:

"Just what instrumentalities of either the state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this Court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers are immune from the tax power of the other. . . . When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit in his dealings with the government may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of the government within the meaning of the rule. . . .

"But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers, hence the limitation upon the taxing power of each so far as it affects the other, must receive a practical construction which permits both to function with a minimum of interference, each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercising of the government affected by it."

Time does not permit a reference to succeeding cases in which the reasoning of the Metcalf case was finally adopted as the rule of the Court governing all cases of claim of immunity of governmental instrumentalities from the tax power of the states or of Congress. The final result was not reached without a struggle. It may be doubted whether this matter of governmental immunity from taxation is of as much practical importance as contemporary discussion of it might indicate. The new principle has not increased the taxable wealth of the country as a whole, but it does permit of a greater variety of taxes and is certain to increase the ingenuity of governments to reach taxable persons' property and functions, a result which the average citizen will not regard as good news.

But the method of reasoning by which the doctrine was established is of importance because it throws additional needed light upon the relationship of our states to the national government. The construction now adopted seems logically sound and a pragmatic rather than a conceptual solution.

(3) Another guiding rule or standard relied upon by Mr. Justice Stone in reaching his conclusions is the eminently sound but much misunderstood policy of refusing to make a decision regarding any constitutional question which is not absolutely essential to final disposition of the case. And as indicated in preceding pages, he insists upon the fullest possible exploration of the facts and pertinent information regarding every problem raised. It will be seen that his whole approach to the constitutional question is in the spirit and by the methods of the common law. This characteristic is nicely brought out by a sentence in his opinion in *Borden's Farm Products Company v. Baldwin*, 293 U. S. 194: "It is not expedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the question clearer."

The foregoing is necessarily a very brief indication of what to the writer seem to be the controlling considerations in the mind of the new Chief Justice in weighing pro and contra arguments concerning the constitutionality of statutes coming before the Court. One would expect him to repudiate, as did Chief Justice Hughes and Mr. Justice Holmes, the suggestion that as a judge he was either liberal or conservative in the political, economic, or social sense of the word. This appears clearly enough in his opinions and votes in cases involving bitterly controverted problems of contemporary society. So his dissenting opinion in *U. S. v. Elgin, Joliet, and Eastern Railway Co.*, 298 U. S. 492, in which he disclosed his ability to detect artful devices by which some corporations have undertaken to evade the law and his firm determination to insist upon substantial compliance rather than a merely nominal and seeming obedience to the law. On the other hand, one of his earliest opinions, *Maple Flooring Mfrs.' Association v. U. S.*, 268 U. S. 563, demonstrates a fair and reasonable attitude even toward big business. In that case it will be remembered that he found that the defendant association did not offend against the Sherman Law, although its activities concerned marketing and prices, and undoubtedly influenced both.

In bitter industrial conflicts of recent years, in so far as they have been brought before the Court, he has reached his conclusions as to the validity of the epoch-making legislation of the last decade by strictly applying his views as to the requirements of constitutional interpretation, and one may surmise that in voting to sustain some features of that legislation, he had grave doubts about their wisdom. But there can be no doubt of his sympathy with efforts to improve the condition of the working man by such methods as collective bargaining, minimum wages, and the regulation of hours and working conditions. The terms "liberal" and "conservative" have been applied too freely and oftentimes with maladroitness to judges. The late Mr. Justice Holmes was gaily dubbed a "liberal" and hailed as one whose opinions were influenced "by his passionate love of the human race," but his intensely interesting letters to Sir Frederick Pollock reveal that his judicial work was dictated by very different considerations and that, in fact, his economic and political theories were considerably more conservative than those of many people who had been dubbed "Tories."

If space did not forbid, it would be interesting to consider the opinions of the new Chief Justice regarding many other topics, among which may be mentioned that of the taxation of intangibles. Beginning with the cases of *Farmers' Loan and Trust Co. v. Minnesota*, 280 U. S.,

204 and *Baldwin v. Missouri*, 281 U. S., 586, the Supreme Court reviewed again this difficult subject, overruled *Blackstone v. Miller*, which had been a landmark, and gave to many persons the impression that it was working toward a prohibition of double or multiple taxation. (See 29 Mich. Law Review 93.) That is a consummation which many taxpayers have devoutly hoped for. But objectionable though such taxation may be, it is difficult to see how it can be foregone in a country with nation-wide business and with fifty or more jurisdictions, to say nothing of local governmental units with the power to tax. Mr. Justice Stone has pointed out the difficulties of reaching the perhaps desirable result above indicated, and in showing the logical absurdity of attempting to attribute *situs* to intangible property has to some extent cleared the path to the legal determination of this difficult subject.

The new Chief Justice's staunch defense of all of the so-called civil liberties for citizens and aliens, for men of all races and creeds and occupations, is so well known that to cite or quote from his opinions in this field is quite unnecessary.

The foregoing is, of course, not an exhaustive or critical examination of the work of Mr. Stone as Associate Justice. Enough perhaps has been said to justify the writer's belief that one statesmanlike judge of unimpeachable character and great ability has just succeeded another of the same high qualities.

ASSOCIATE JUSTICE JAMES F. BYRNES

By FRANK J. HOGAN

of the Washington, D. C., Bar

SHORTLY after 11 o'clock on the morning of Tuesday, July 8, 1941, at the desk of the President of the United States in the Executive Offices in Washington, James Francis Byrnes, of South Carolina, became the 74th American citizen to take oath as an Associate Justice of the Supreme Court of the United States. The oath was administered by Chief Judge Richard S. Whaley, of the United States Court of Claims, who, like Byrnes, is a native of Charleston. Mr. Justice Byrnes is the first South Carolinian appointed to the supreme bench since William Johnson, of that state, was appointed by President Jefferson on March 26, 1804.

Members of the profession interested in the views of the new Supreme Court Justice on such subjects as (a) what the executive power may appropriately consider in making judicial appointments; (b) the three methods, rather than one, by which the Federal Constitution has been and always will be subject to amendment; (c) the importance of the legislative branch in our constitutional scheme of things and the respect which the judicial branch should have for the action of the Congress when the constitutionality of any act is challenged; and (d) the effectiveness of the right of appeal from the legislature to the people, will find these views frankly stated in an address delivered by Byrnes during the annual meeting of the American Bar Association in 1939.[1]

In that address, which the JOURNAL editorially characterized as "thoughtful," Byrnes, after quoting Chief Justice Hughes' declaration that "What the people really want they generally get," pointed out that changes in public opinion invariably were reflected in the decisions of the Court, and said, in substance, that the prevailing sentiment is bound to be reflected in the exercise of the appointing power. Enlarging upon this, he continued: "I do not mean that judges are, or should be, chosen because of their views on particular issues. What I do mean is that the general attitude of a man toward government and toward the judicial function necessarily is taken into account. Certainly it has been taken into account in the past." He pointed out that when President Lincoln had under consideration the appointment of a Chief Justice he frankly acknowledged that "we wish for a Chief Justice who will sustain what has been done in regard to emancipation and the legal tenders"; and continued that President Theodore Roosevelt was even more explicit when, while considering the appointment of Justice Oliver Wendell Holmes, he said, in a letter to Senator Henry Cabot Lodge: "Now I should like to know that Judge Holmes was in entire sympathy with our views, that is with your views and mine . . . before I would feel justified in appointing him." Byrnes explained that he did not cite these presidential views "as models for the exercise of the appointing power," saying that it may be seriously questioned whether they did not reveal an undue attention to the supposed opinions of those under consideration for judicial appointment on specific political issues, rather than their general attitude towards representative government. But, he insisted, at least they show an awareness that judges are human, and that the selection of judges will in all probability affect the course of constitutional law one way or the other. "Let us not," he said, "set up a double standard in this matter of choosing judges. A lawyer whose experience has been primarily on the side of defending governmental measures will be as much or as little affected by his experience as the lawyer who has primarily been engaged in resisting governmental measures." In support of this statement the

1. 25 ABAJ pp. 667-71.

Associate Justice JAMES F. BYRNES

new Justice quoted Associate Justice Samuel F. Miller.[2]

It is Byrnes' position that one must be incapable of reading aright our constitutional history who insists that the single manner of amending the Constitution is that specifically prescribed by the Constitution. From the beginning, the Constitution has been amended, he says, (1) in the manner specifically prescribed by the Constitution; (2) by custom; and (3) by judicial interpretation. And whenever, in one or the other of these ways, the Federal Constitution has been amended, the amendments were in order to respond to the needs of the people, and were accepted by the people. It is his view that "This flexibility is the Constitution's strength, not its weakness."

Pursuing the subject, Senator Byrnes called attention to the fact that since the adoption of the Bill of Rights in 1791 only 11 amendments have been submitted and ratified in the manner specifically provided for in the Constitution, adding that "For every time that the Constitution has been amended, it has been changed ten times by custom or by judicial construction." In support of this, the speaker pointed out that the most drastic change ever made in our entire system of government was that which transformed the electoral college from a body of statesmen, chosen for the purpose of selecting a President, to a body that exercises no real function in that selection. That great departure from the plan of the founding fathers illustrated amendment by custom, acquiesced in by the people. Most of our constitutional amendments came about through judicial construction, the third of the methods by which amendments have been made. Some of the "amendments" by judicial construction have been in the nature of clarifying amendments, making specific what had been left general and vague. Others have been changes of substance, which in turn, like railroad schedules, are subject to further change without notice, to be found in later decisions of the Court. Citing examples of "amendments" by Supreme Court decisions, Byrnes quoted early lamentations over the impending destruction of the Nation as an inevitable result of shifts in constitutional doctrines when what Mr. Justice Story called "the Old Court" lost ground and new men and new opinions succeeded.

In all of this, it is the view of the new Justice, there can be found no reason for pessimism. Rather, life, and not death, is to be found in a judicial tribunal which, in the words of Justice Brandeis, "bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."

Mr. Justice Byrnes believes that the increasing reluctance of the Supreme Court to strike down Acts of the Congress rightly adds to the importance of the legislative branch of the national Government. And this being so, he stressed, in his San Francisco address, as he had on numerous occasions, the ever increasing importance of the election by the people of wise and able legislators. Holding that one element of the oft referred to "judicial temperament" is respect for the views of the legislature, a coordinate branch of government, Senator Byrnes ventured to think that henceforth the rule that every presumption is in favor of the validity of an Act of Congress will be honored more in the observance than in the breach. "Some men doubt the wisdom of the Court in solving doubts in favor of the action of Congress. They believe it unwise because they really do not believe in Government by the People. . . . Legislators may make mistakes, but miscarriages of justice are probably less frequent in legislation than in the decisions of judges and juries. In any event, from legislation there is always an appeal—an appeal to the people."

From the foregoing, one readily gathers that Byrnes has an abiding confidence in the people of America. But it would be a mistake to think, because of this, that there is anything demagogic about him. His long and remarkably steady-headed career attests the exact contrary. At an unusually early age Byrnes entered the National House of Representatives and he became a leader in that body with unprecedented speed. Writing in the Saturday Evening Post about a year ago, the nationally known Washington commentators, Joseph Alsop and Robert Kintner, pictured the power of Byrnes when he was barely past his mid-thirties, in these words:

> "In the sad year 1918, the power of the purse in the nation at war was largely in the hands of the deficiency subcommittee of the House Appropriations Committee. Day after day, from early morning until late at night, the chairman, seasoned Swagar Sherley, of Kentucky, his young chief lieutenant, James Francis Byrnes, of South Carolina, and the great Republican veteran, Uncle Joe Cannon, held their hearings in the Appropriations Committee's high, bleak, frescoed chamber. . . . The trio bore the entire responsibility for the vast and ramifying expenditures of the American war effort; what they passed, the House approved, and what the House approved, the Senate voted."[3]

Mr. Justice Byrnes served fourteen years in the House, and when, after an absence of six years from Washington, he came to the Senate two years before the end of the Hoover Administration, he almost immediately became a member of the group of senators who during the depression years and the existing national emergency have carried a tremendous burden of leadership. Had there been anything of the demagogue about Byrnes, his name would long ago have been so frequently on the front page as to have been known generally throughout the country. But the fact is that although Washington newspaper correspondents, as well as those highest in Government circles during the past decade, have long recognized Byrnes' unassailable position in the foremost ranks of the upper House of Congress, so quietly did he go about his work and so un-

2. Fairman, "Justice Samuel F. Miller," Political Science Quarterly, Vol. 50, p. 43.

3. Saturday Evening Post, July 20, 1940.

spectacular were his methods that it is not believed that the position he held, the influence he wielded, and the power he had, were popularly known throughout the country until he was prominently and frequently mentioned as a vice-presidential possibility during the early stages of the 1940 campaign. The reason for this is not difficult to understand when it is recalled that Byrnes, though an effective and pleasing public speaker, seldom aired his views in the public debates of either Senate or House. He rarely took the floor, but when he did it was to express his views on a subject which he had previously carefully mastered. To quote again the writers already referred to: "In the Senate chamber [Byrnes] is far more often to be seen whispering to a colleague in a corner than spouting in the center of the floor, and when he does spout he spouts facts, not rhetoric."

An examination of the Senate record of the new Supreme Court Justice will show that while he was found in agreement with the President more frequently than otherwise, he nevertheless time and again displayed a complete independence of Administration views and wishes, and not only voted contrary thereto, but voiced active opposition. He was quick to proclaim the illegality of sit-down strikes when that revolutionary method of industrial sabotage was imported into this country from France. He proposed an amendment to the then pending Guffey Coal Act denouncing the sit-down strike as unlawful, hoping thereby to get the Senate, the House, and the President on record. He was not satisfied with the substitute, which, by simple resolution, merely expressed the Senate's view. Byrnes earnestly, though unsuccessfully, sought a horizontal cut in all Federal appropriations, warning against uneconomic governmental expenditures, and pointing, with a vision the clearness of which is verified by the present, to the necessity of conserving the Nation's economic resources against that time when national security would necessarily strain those resources. By voice and vote he sought the defeat of the wage-hour law as it originally came before the Senate. He dropped a figurative depth bomb into our most deliberative legislative body when he introduced a bill to make it an offense for any Senator or Representative to present or support a claim against the Government, an application for a loan from any Government agency, or an effort to secure any Government contract. He repeatedly insisted that if Senators ceased to be attorneys and messengers for claim-prosecuting, money-borrowing, or contract-seeking constituents, they would be thereby enabled more efficiently and wisely to perform the legislative functions for which they were sent to Washington.

Byrnes' feet are always on the ground; his head generally cool; his thinking is clear; his reasoning sound. He is a tireless worker. His background includes a well rounded career at the bar. In his teens he entered the office of one of Charleston's best known law firms and there commenced to read law under the direction of Judge Benjamin H. Rutledge, a descendant of the signer of that name. He had hardly attained his majority when he was appointed a Circuit Court stenographer by Judge James H. Aldrich, a learned and kindly jurist. Judge Aldrich continued the legal tutoring which Judge Rutledge had begun, and Byrnes was admitted to the bar by the Supreme Court of his state in his early twenties. For years he rode the circuit. For a time he held the office of prosecuting attorney. His experience boxed the compass of the practice of law as it is known in our southern and western states, and, indeed, in all but the metropolitan areas throughout the country. Two-fisted trial lawyer, in all sorts of litigation, he was dignified and persuasive in appellate tribunals, and a safe guide either in the family circle or before the corporate board during his nearly four decades at the bar. In the years preceding his election to the Senate he was a member of one of the most active and successful firms in his native state.

ASSOCIATE JUSTICE ROBERT H. JACKSON

By HON. WILLIAM L. RANSOM

of the New York City Bar

IN SUPPLEMENTING for readers of the JOURNAL the published chronicles of the career of this new member of the Court, it may be of interest to refer to the fact that his appointment brings into the Court a lawyer who has long been active in the organizational work of both the American Bar Association and his State and local Bar Associations. As a member of the Jamestown (New York) Bar Association, he was a leader of the group which pioneered the formation of the Western New York Federation of Bar Associations, and served as its President in 1928-30. This organization was the forerunner of many other federations of local Bar Associations, throughout New York State and elsewhere, and its plan and workings were studied in the drafting of the present structure of the American Bar Association, which federates State and local Bar Associations and other organizations of the legal profession, through the representative House of Delegates.

"Bob" Jackson's interest in the organized Bar led him

Associate Justice ROBERT H. JACKSON

also to become active in the National Conference of Bar Association Delegates, then a dynamic part of the American Bar Association; and he served as the Chairman of the Conference in 1933-34. Among his predecessors were Elihu Root and Charles Evans Hughes. He is a member of the American Law Institute, the Jamestown Bar Association, the Erie County Bar Association, and The Association of the Bar of the City of New York, and has served long on the Executive Committee of the New York State Bar Association. He represented that Association on the New York State Commission to Investigate the Administration of Justice, and was Chairman of the Commission's sub-committee for the improvement of civil practice. Since his appointment as Solicitor-General of the United States in 1938 and as Attorney-General in 1940, he has been an *ex officio* member of the House of Delegates of the American Bar Association, has taken marked interest in its deliberations, and has attended and taken part in its meetings when official duties permitted. Like other members of the House and the Association, he did not by so doing surrender his individual views to the consensus of deliberative opinion to which he contributed; but he gave respect to the action of the representative body of the National organization of lawyers.

His story-book rise to place and power and his elevation to the Court at the age of forty-nine show that it still is possible in a small American city to build a law practice, develop a personality, shape a career, attain great distinction, and have a most satisfying life, by sheer merit and hard work.

"Bob" Jackson was born on the family farm at Spring Creek, in Warren County, in northwestern Pennsylvania, near the New York State line, on February 13, 1892, the son of William Eldred and Angelina Houghwout Jackson. His was the third generation of Jacksons to be born on the farm, which had been cleared by his great-grandfather, Elijah Jackson, in 1797, when he struck out across the mountains, from Litchfield, Connecticut, to found the first white settlement in Spring Creek Township. Elijah and his son, Robert P., made a living in the early days by hewing timber which they floated down the rivers to Pittsburgh, then to walk home through the forests. Robert H.'s first view of a large city was of Pittsburgh, from a railroad box car, in which he went to Pittsburgh with a horse which his father had sold.

The mother of the new Associate Justice was descended from the Dutch Houghwouts, who came to New Amsterdam when the country was still known as the New Netherlands. Mr. Jackson is a member of the St. Nicholas Society of the City of New York, an organization of descendants of natives of New York prior to 1785.

His great-grandfather on the paternal side was the grandson of George F. Eldred, the younger son of a British barrister. With two older brothers, he came to America shortly before the death of King George III. George Eldred settled in Spring Creek, Pennsylvania, and was for many years the only Whig voter in the township. He brought with him a number of books—a rare commodity west of the Alleghenies in those days—and a knowledge of surveying and mathematics. Later, dissatisfied with the standards of the frontier schools, he wrote several textbooks for the education of his children. Some of these texts have been preserved.

When Robert was about ten years old, his family moved to the Village of Frewsburg, nearby in New York State. He attended grammar school there, high school in Frewsburg and nearby Jamestown; he represented both high schools on debating teams, and developed a flair for public speaking, in furtherance of his purpose to become a lawyer. He learned law in a hard and practical way, chiefly through studying law in a Jamestown law office. He attended Albany Law School for a short while. Long before he was admitted to the Bar in 1913, he was trying cases in the Courts of the Justices of the Peace.

Mr. Jackson soon commanded recognition as one of the ablest trial lawyers and business counsellors in Western New York. In a manufacturing city of about 35,000 and an agricultural county, his practice was in almost every branch of law. He was vice-president and general counsel of the Jamestown Street Railway Company, and was a director and general counsel of the Jamestown Telephone Corporation and the Bank of Jamestown. He appeared in many cases for electric utility corporations in Western New York, and also represented farmers, labor organizations, and small merchants and manufacturers, in the grist of a busy and profitable practice. The docket of that Western New York Law office shows that before Robert Jackson had begun his public career he had argued in the Appellate Division and Court of Appeals of New York fifty-seven cases involving all sorts of questions of law and fact.

He has never been a candidate for elective public office, and those who know him best believe that he never planned or expected a political or public career. The late Chief Judge Cuthbert W. Pound, of the New York Court of Appeals, said of him, about twenty years ago, that "This young man will smile his way into any place he wants to go." But he seemed never to want to go anywhere except as a lawyer. His dominant interest has continued to be in the law, and the offices which he has held have been professional rather than administrative or purely political. He never seemed to want or seek office or promotion to office except possibly that of Solicitor-General, which he had long regarded as the goal of a practising lawyer's ambition. If at heart he wanted any of the public law offices he has held, his only technique of quest was to make his promotion seem natural.

In 1918 he was appointed Corporation Counsel of the City of Jamestown by its Republican Mayor and confirmed by its Republican Common Council. He came first to Washington in 1934, as general counsel

for the Bureau of Internal Revenue, where he headed a law office of nearly 300 attorneys. Later, he was appointed special counsel to the Securities and Exchange Commission, where he tried the vital cases testing the constitutionality of the Public Utility Holding Company Act. In 1936, he went to the Department of Justice as Assistant Attorney-General in charge of the Tax Division. In this capacity he went personally into Federal District and Circuit Courts to share the fortunes of the trial lawyers of his Division in fighting through to favorable decisions by the Supreme Court many test cases on the validity of the unemployment compensation, old-age benefits and other laws within his jurisdiction. In 1937, he was appointed Assistant Attorney-General in charge of the Anti-Trust Division. Here again he appeared personally in the lower Federal Courts to argue anti-trust cases, most of which he carried to successful termination in the Supreme Court.

A year later, President Roosevelt appointed him Solicitor-General of the United States, in which capacity Mr. Jackson argued in the Supreme Court probably more cases involving the question of constitutionality than any other lawyer has done, whether in public or private practice. On January 4, 1940, he was named Attorney-General of the United States, and was sworn in on January 18, 1940.

In each of these professional capacities, he was a diligent and vigorous attorney for his client, the Government of the United States, as well as the boon friend and one of the most trusted advisers of his chieftain, the President of the United States. In his representation of public causes, he showed the same ardor, loyalty and devotion to his client, and outspoken zeal—excessive zeal, some folks said—which had been characteristic of his work for private clients. He never "pulled his punches" in his professional work, for private clients or for the Government; broadened by experience, he has remained about the same genial, hard-working, hard-hitting lover of his profession and his country. Like Root, Taft and Hughes in their Cabinet days, he has "carried the flag" in battle for the Administration for which he has been a spokesman; and he has taken smilingly the acclaim and the criticisms which have been by-products of his zeal on the firing-line.

At Albany in 1916 Mr. Jackson was married to Miss Irene Gerhardt, who has frequently attended functions of the American Bar Association with him and has shared his popularity. They have a son, William E., born in 1919, and a daughter, Mary Margaret, born in 1921. Mr. and Mrs. Jackson are of the Episcopal faith. His chief diversion is horses, which he rides, breeds, and trades, on his farm near Jamestown. He also operates a small power-cruiser on beautiful Chautauqua Lake nearby, which he whimsically named "The Alibi" and enjoys "because it has no telephone." He is fond of fishing and camping trips, has traveled widely, and read extensively, to the exclusion of hobbies such as golf and bridge.

Understanding of his outlook on public questions would be aided by an appreciation of the atmosphere of rugged independence, free discussion, and keen solicitude for the rights and welfare of the individual, which pervaded his city and county, so profoundly influenced by the presence of Chautauqua Assembly, with its great public platform to which the leaders of public thought came and spoke. In his most active days in private practice no less than in public office, he shared his home town's habit of courage and outspoken action in behalf of independent thinking, the substance of human rights. Perhaps his attitudes of mind and his habits of action have been affected by the fact that he was a steadfast member of the minority political party, "in the Chautauqua hills, where men have to fight to hold that faith." His mature approach to many of the problems of today was revealed in his address on modernizing the law of defense, published in the June issue of the JOURNAL, and in his analysis of the judicial work and decisions of Chief Justice Hughes, which he wrote for the July issue of the JOURNAL.

"I came from people too busy making a living, to work life's annoyances up into a philosophy," said Mr. Jackson in California two years ago. "I believe that the mass of Americans rightly feel that no good will come to them from any side in a war of abstract 'ideologies.' The way of life of the American is practical, hard-headed and concrete. It is not made of what Justice Holmes once called 'pernicious abstraction.' Its distinguishing ideology is that it has no 'ideology' except to get results." He is fond of quoting, as an expression of his own philosophy, Mr. Justice Holmes' aphorism; "I have little faith in panaceas and almost none in sudden ruin." In the field of National policy, he has declared that "the great need is to re-examine the work which has of necessity been done in haste and in emergency. In these calmer days measures which have failed should be rejected or replaced; those which reveal shortcomings should be amended; those with hope and promise should be strengthened and their administration improved. Evils not yet touched must be remedied by measures yet untried. The task ahead is one that calls for the same practical common sense that is the most American thing about America. It needs the open minded testing of policy not by some 'ideology' but by its effect on the welfare and the daily lives of the masses of the American people." In paying public tribute to a life-long friend and public official in Jamestown, "Bob" Jackson perhaps put in words his own ideal for himself:

> "The distinguishing thing about him has been a certain vision and basic understanding of people. He has been able to sit in a conference in his office and yet see through the walls of men's homes and know how the problem of that conference was affecting their firesides. • • • The result of this vision was that no group was ever able to surround him. No little coterie ever could overwhelm him. He could think his way through them and around them. • • • His public life has been good for the soul of this city. He has shown us how to take victory without arrogance and how to take defeat without hatefulness. He has taught us how to follow ways of peace—peace for the nations

of the world, and peace for the groups within the city. He has taught us how to go through the petty irritations that are inseparable from political life, without becoming a petty man. He has never imagined himself above the ways or problems of humble people."

The new Associate Justice is an experienced and forward-looking lawyer, and will bring to his new field of work a trained and facile mind, as well as a kindly and understanding approach to the problems of counsel on oral argument. Those who know him best have no doubt that, throughout his career at the Bar, his deepest interest has been in the actual work of the Courts, rather than in the political or administrative side of government. His friends expect, therefore, that his judicial work will reflect his ripe experience, his habits of work and research, his dominant interest in the law as the bulwark of human rights and of certainty in business relationships, and above all his deep-rooted belief that liberty and justice can best be maintained with the aid of law-governed Courts and courageous, capable lawyers, under the American Constitution.

AMERICAN JUSTICE*

By HON. JACOB M. LASHLY

President, American Bar Association

WE ARE come together, judges and lawyers, to take counsel and courage from one another. In this instance the judges have taken the lead; and it is fitting that they should have done so, for the purpose of the Conference is the advancement of the administration of justice. Judges are those who have dedicated their lives and devoted their careers to this pursuit. And I am to speak as a representative of the Bar, whose members have been invited to participate in the exchanges and deliberations here, under the aegis of recently enacted law and the long established practice of this Court. Lawyers welcome the opportunity to meet with the judges on common levels, such as this, for experience testimonies and for devising plans to insure the more practical operation of the institutions of democracy and justice. As a representative of the organized Bar I gladly accepted the invitation of Judge Parker, acting for the Fourth Circuit Court, and appreciate the privilege which it is affording me to share in the wholesome atmosphere of this significant occasion and to have a part in these healthful judicial exercises.

There is no other work in which the organized bar could be engaged or business with which it could be concerned of so great value and merit—of such vital importance, in these dangerous years. Unless the men and women of our profession shall be united and consecrated to the business of justice; except that lawyers shall be found organizing to promote a legal system under which people are to live and find satisfaction in the operation of governmental authority as the accepted means of securing right and fair dealing, I should feel compelled to admit that much of their associational activities and exertions have been spent in vain.

But we shall not all have precisely the same conception of the meaning of the word "justice." Like "liberty" it presents a variety of forms in modern times, and exists in the world as an ever changing complex, about which various governmental systems are clustered and upon which many social theories are laid. The present tragic state and threatening posture of world affairs brings up the term for re-examination, again and again. Who is to determine its meaning, and for whose use and benefit is it to be defined?

The Germany of Hitler, the Russia of Lenin and Stalin, the Italy of Mussolini, all have been forged and established through the instrumentality of malignant hatred, the basest intrigue, and the most abhorrent brutality: but in the name of justice. It was not the contribution of Evolution by Charles Darwin, but his theories of Evolution by natural selection through accidental variations which introduced into the current of thought of the present century a wholly mechanical and material conception of justice. Similarly according to the social evolutionary theories of Karl Marx the individual counts for nothing, has no purpose of his own. "It is the class that counts" he said, "a group determined by the force of production operating at a given time and place." Class war is the fruitage of this system, from which, as in the Darwinian theory, the strongest and fittest alone will emerge victorious and be permitted to survive. It is but a short distance from the class war to the intense racial mysticism of Hitler, which accommodates itself with ease to the justice of the claims of German Superman. Recently an American historian has remarked: "We may note in passing that while the schooling by which Marx hopes to mold a fighting force consists in hatred and merciless antagonism, these same proletarians are to maintain loyalty, devotion, and sweet comradship towards one another."[1] Finding from bitter experience that this does not work out, and describing a mood which came to him one night, after years of the most rigorous devotion to a modern crusade for universal justice through means of chicane and

*Address delivered before the Judicial Conference of the Fourth Circuit United States Court of Appeals, at Asheville, N. C., June 20, 1941.

1. Jacques Barzun-Darwin, Marx Wagner.

violence, Jan Valtin suddenly thought of himself and his comrades as "maniacs paddling through the night in coffins—dead men on furlough."[2]

In their quest for justice according to their ideas and plans these theorists have separated man from his soul. Perhaps no more revealing example of *retributive* justice could be discovered in all history than that of Germany and Russia in the act of making realistic application of these theoretical systems of justice, on watch at the borders of the latter country while the world awaits an announcement of their closing in desperate embrace to battle with the utmost ferocity and inhumanity over possession of the surpluses produced or potentially available from the toil of the workers, to whose welfare the Governments have piously pretended to be devoted.

Once I saw the term "civilization" defined (by whom I do not know) as "the sum of human wants at any given time."

What, then, is it that we have come to want? What kind of justice?

It seems certain that the justice which Darwin found to be established by the law of nature, and that which Marx had proclaimed as the rule of necessity were entirely void of the qualities of human sympathy or compassion.

In the Declaration of Independence of the American colonies, the underlying theme and purpose was liberty. Freedom from the restraints imposed by a foreign government upon the actions, plans and free intercourse of a people among whom an aspiration for a fuller national life and experience was being born. The subservient status imposed upon them seemed unjust to the colonial fathers, and so in the achievement of liberty they had but realized their conception of justice. In due time the constitution was formed in which self-imposed restrictions and limitations marked the beginnings of an ordered life. Either life, liberty or property might be taken in the public interest, but only after due process of law. Thus liberty was achieved and made secure, within the channels of justice.

The objects sought to be accomplished by the now elaborate machinery of statute and common law which since has been builded upon the foundation of the Constitution are to be found in the hope and faith of a people searching for the good life through the means and instrumentalities of truth, tolerance and order.

Mr. Jefferson, in taking over the duties of the presidency of the only existing Democracy in a world of autocratic systems, explained and defined the undertakings of the great adventure which the new world had set upon:

> "About to enter, fellow citizens, on the exercise of duties which comprehend everything dear and valuable to you, it is proper that you should understand what I deem the essential principles of our government, and consequently those which ought to shape its administration. I will compress them within the narrowest compass they will bear; stating the general principle, but not all its limitations. Equal and exact justice to all men, of whatever state or persuasion, religious or political."

Nearly a century and a half later another great patriot, Charles Evans Hughes was to say:

> "Democracy is a most hopeful way of life, but its promise of liberty and of human betterment will be but idle words save as the ideals of justice, not only between men and man, but between government and citizen are held supreme."

Since liberty is impossible except it be placed upon the foundation stone of justice, these two elements combine to form the spiritual force and the spiritual values in the American Democracy. It is this quality which distinguishes the American philosophy of justice from the others. George Santayana has said that the human spirit is the flame, the body is the candle. The color, clarity and direction of light which the flame will give depends upon the circumstances and environment in which the candle burns. In the last analysis what counts, and the only thing that really counts, is the intensity and purity of the flame.

In the course of the age-long struggle between political power and economic ambition, the inevitable accompaniment of the rise and fall of material prosperity and wealth, the way of privilege or advantage is not always illuminated by the rays of reason or right. But when reduced to naked principle by the science of jurisprudence administered by skilled hands, the most serious and vexing problems of the day are capable of being understood and accepted by the people whose interests are involved. A public and patriotic duty is thus thrust squarely upon the Bench and the Bar to maintain the mechanisms of the judiciary department of government so as to make it both responsive and available to the justice needs of the people. It is in the earnest hope and the confident expectation that we shall be able to contribute to this end that we have assembled here.

In a monograph issued by the Russell Sage Foundation in the year 1938,[3] dealing with the status of the legal profession in the United States, Dr. Brown, the author, had concluded that it was doubtful whether the Bar had any clear conceptions or plans for translating the obvious needs for improvement in the instrumentalities of justice into purposeful action. She found, in her own words, that, "opinion has not crystalized, and such action as there is, is of a halting, uncertain and unintegrated nature."

Frankness compels recognition of a certain validity in this serious indictment. But several factors have intervened since the facts revealed by this investigation have been made known which would have to be taken into account in any analysis of the situation which might be made now. One of the facts which may not have been so easily recognizable from the disadvantage

2. Out of the Night—Jan Valtin.

3. Lawyers and the Promotion of Justice, by Esther Lucile Brown, Russell Sage Foundation, 1938, p. 289.

of outside inspection was that the Bar had an internal problem of leadership to solve before it could offer itself to the public with any real hope of cohesive effect or efficient achievement. Since those conclusions were written, the Judicial Conference within the Federal Judicial system and the growing Judicial Council movement within the states both by statutory enactment and voluntary arrangement appear to be offering a measure of solution to the problem within the ranks of the Bar. The embarrassment often felt by lawyers engaged in practice before the courts to complain about or to point out the defects in the systems of practice administered by the judges is dispersed by the mere fact that the judges themselves are inviting them to do this very thing. In my estimation nothing has occurred within the whole of the annals of the courts of America which has offered so great promise of genuine, progressive improvement in the administration of Justice as the passage of the Administrative Office Act and the setting up and putting into operation all of the machinery contemplated in the Act or incidental to its functioning. Not only do the administrative practices under the law result in an awakened interest and a new conception of leadership among the judges of the Federal courts, but they furnish a pattern as well as an incentive to the members of the Judiciary and the Bar of the states, some of whom had long ago surrendered to a sense of futility, deeming the possibility of successful assaults upon the old citadels or the prospect of advance to modern methods or requirements to be beyond hope. And, then, there is a factor which has arisen within the current year, which could not have been foreseen in the year 1938, but which is making a distinct contribution to the hope of improvement in Judicial administration and which undoubtedly is destined to increase in intensity and influence. The very excesses which are being practiced in the predatory countries in the pursuit of "justice" without humanity have reacted in an overwhelming psychological revolt among the members of the American Bar. The result is an unprecedented integration and aroused interest in the organization of the Bar for the defense of the American ideals of justice and the institutions of Democracy.

It would not be possible to predict with any degree of comfort the extent to which this quickened purpose and willingness to serve can "be translated into a program of purposeful action," but I do not hesitate to assert that the judges throughout the country who, like those of the Fourth Circuit, have accepted the challenge of the times to leadership of the Bar for the improvement of methods and practices of Judicial Administration, are finding a spirit of eagerness among the fellowship of lawyers unequalled within the memory or experience of any of us.

De Tocqueville, who had visited America during the administration of President Andrew Jackson, in writing his penetrating comments upon the things which he had seen and heard in the new Democratic state upon his return to France, commented:

> "In visiting the Americans and studying their laws, we perceive that the authority they have entrusted to members of the legal profession and the influence which these individuals exercise in the government is the most powerful existing security against the excesses of democracy."

And continuing, in a more apologetic mood, he added:

> "I am not unacquainted with the defects which are inherent in the character of that body of men, but without this admixture of lawyer-like sobriety with the democratic principle, I question whether democratic institutions could long be preserved, and I cannot believe that a republic could subsist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people."[4]

I believe that the members of our profession in America, even conceding a serious lack of cohesion, unity and group consciousness, at times, have on the whole maintained the interest and influence in the public business which this astute news-commentator had found in another day; that in the dangerous and difficult times which lie ahead they will be found capable of associating themselves together more closely by the accommodation of their individual views and preferences as to methods, for a greater unity and force in advancing the great enterprise of American justice.

4. *Democracy in America*, De Tocqueville, Vol. 1, Chapt. XVI.

NOTICE BY THE BOARD OF ELECTIONS

As a result of the ballots cast by members of the Association in the Territorial Group (Alaska, Canal Zone and Philippine Islands), the Board of Elections announces that L. Dean Lockwood of Manila, P. I., has been elected State Delegate from that jurisdiction. Mr. Lockwood is elected for the regular three-year term and for the vacancy in the term which will expire at the adjournment of the 1941 Annual Meeting.

This notice did not appear with the story which appeared in the July JOURNAL announcing other State Delegates recently elected because the polls were not closed for receipt of ballots from the Territorial Group until July 18, 1941.

EDWARD T. FAIRCHILD,
Chairman, Board of Elections

SOME ASPECTS OF THE CONSTITUTIONAL POWERS OF THE PRESIDENT*

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ONE month ago today the President of the United States declared the existence of an unlimited national emergency.[1] Since this proclamation, some apprehension has been expressed as to whether the steps taken during the emergency will be at the expense of our system of popular government.

My purpose today is to describe some aspects of the President's constitutional warrant for extraordinary action—action which is called extraordinary only because the circumstances which require the action are themselves extraordinary.

The framers of the Constitution were well aware of the need for concentrating powerful authority in a single Executive. With great foresight, they provided us with a strong and unified executive with sufficient powers to preserve, protect, and defend the Union.

The delegates to the Constitutional Convention represented an unusual array of talent and legal ability. Among them were two who were to be President[2] and one who was to be Vice President,[3] five who were to become justices of the Supreme Court of the United States,[4] and also such legal giants as Alexander Hamilton, the first Secretary of the Treasury, and Edmund Randolph, first Attorney General of the United States, and Luther Martin. These delegates were just emerging from a bitter experience with weak executive authority under the Articles of Confederation. They had also seen the serious effects of usurpation of executive power by some state legislatures.

I shall consider only those powers of the President which spring full blown from the Constitution without statutory implementation. Furthermore, I shall limit my discussion to some aspects of (a) his powers as Commander in Chief, (b) his powers to control foreign affairs, and (c) his powers as President to protect the Union.

I

Powers as Commander in Chief

The Constitution designates the President as the Commander in Chief of the Army and Navy of the United States, and of the militia of the several states when called into the service of the United States.[5] The various powers included in this grant are not stated in detail in the Constitution.

When the Constitution was being drafted and ratified the only objection made to this power seems to have been that it permitted the President to command in person.[6]

This objection, however, made little headway. And today if President Roosevelt wished to command the north Atlantic patrol from the bridge of the *Augusta*, he could point to the precedent established by President Washington who left the Executive offices at Philadelphia and rode with his troops for a month during the Pennsylvania Insurrection.[7]

When the Constitution was adopted, the power of Commander in Chief over the armed forces of a state was frequently vested in the governor of the state.[8] Hamilton commented in *The Federalist* on what the framers of the Constitution contemplated when they inserted this power. He said:

> "* * * The propriety of this provision is so evident in itself, and it is, at the same time, so consonant to the precedents of the state constitutions in general, that little need be said to explain or enforce it. Even those of them which have, in other respects, coupled the chief magistrate with a council, have for the most part concentrated the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. *The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.*"[9]

"The direction of the common strength"—that is an important concept. It proves that, even in the eighteenth century, statesmen realized, first, that the waging of war not only involves the sending of armies into battle but also calls for the strength of the whole nation, and, second, that it is of paramount importance that the powers of directing the common strength in the common defense be concentrated in the Chief Executive of the Nation.

Our war Presidents have never hesitated to use their powers as Commander in Chief for purposes other than for directing the movements of our military and naval forces.

During the Civil War, for example, Postmaster General Blair, at the direction of the President, closed the mails to matter that might instigate others to cooperate with the Confederate States.[10] He specifically re-

*Address delivered before New York State Bar Association, Saranac Inn, N. Y., June 27, 1941.

1. Proclamation No. 2487 of May 27, 1941, 6 Fed. Reg. 2617.
2. George Washington and James Madison.
3. Elbridge Gerry.
4. John Rutledge, Oliver Ellsworth, James Wilson, William Paterson, and John Blair.
5. Article II, Section 2, Clause 1.
6. See Luther Martin's letter to Maryland legislature in 1 Elliot's Debates (2d ed. 1836) page 381 at 425; see statement by George Mason in Virginia ratifying convention in 3 Elliot's Debates (2d ed. 1836) pages 454-455.
7. Writings of George Washington (1836 Sparks ed.) Vol. X, pages 438 and 446-448.
8. Warren, The Making of the Constitution (1937 ed.) page 530.
9. No. 74 of The Federalist.

fused transmission through the mails to certain newspapers which publicly advocated that the Federal Government accede to the demands of the Confederacy.[11]

The House of Representatives' Committee on the Judiciary investigated this activity by Blair and determined not only that he had authority to act as he did but that it was his duty to do so.[12]

Again, during the first World War, President Wilson created the Committee on Public Information under his authority as Commander in Chief.[13] Without any statutory authority he exercised a censorship over cables, telephones and telegraph lines.[14]

The powers of the President as Commander in Chief are not contingent upon a declaration of war by the Congress. Furthermore, as the late Chief Justice Taft pointed out, Congress "cannot provide an army of which the President must be Commander in Chief, and then in the law of its creation limit him in the use of the army to enforce any of the laws of the United States in accordance with his constitutional duty."[15]

Instances where this power has been exercised are well known. For example, in 1854 during political upheavals in Nicaragua, the President and the Secretary of the Navy ordered an American warship to proceed to Greytown to defend the lives and property of American citizens.[16]

Subsequently, in a lawsuit growing out of this incident, Justice Nelson of the Supreme Court of the United States sitting, on circuit, declared:

> "Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. Under our system of government, the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving."[17]

The Santo Domingo expedition during Grant's administration,[18] the use of Federal troops in the Pullman strike under Cleveland,[19] the American expedition to China during the Boxer uprising,[20] the bombardment of Vera Cruz in Wilson's time,[21] the numerous landings of marines in Latin America in more recent years—all these indicate the broad limits of the President's discretionary power to use the armed forces of the United States.

In this day when there is so much discussion over convoys, I wonder if it is generally realized that without any authority from the Congress, and in time of peace, President Buchanan, who usually took a narrow view of the powers of his office, nevertheless ordered a naval force to Cuba "to protect all vessels of the United States on the high seas from search or detention by the vessels of war of any other nation."[22]

As you all know, the most recent example of the use of this impressive power of the President is the Executive Order in which President Roosevelt directed Secretary

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10. Executive Order No. 1 Relating to Political Prisoners, dated Feb. 14, 1862, and signed at the direction of the President by E. M. Stanton, Secretary of War. Richardson, Messages and Papers of the Presidents (1897 Gov't. Printing Office) Vol. VI, page 102 at 103.

11. House of Representatives Miscellaneous Document No. 16 of January 20, 1863, 37th Cong., 3d Sess.

12. Ibid.

13. Executive Order No. 2594, dated April 13, 1917; Corwin, The President—Office and Powers (1940) page 193; Berdahl, War Powers of the Executive in the United States (1920 Univ. of Ill. Studies in Social Science) page 172. See also Mock and Larson, Words that Won the War (1939) pages 50-51.

14. Executive Order No. 2604, dated April 28, 1917; Berdahl, War Powers of the Executive in the United States (1920 Univ. of Ill. Studies in Social Science) page 200.

15. Taft, *The Boundaries between the Executive, the Legislative, and the Judicial Branches of the Government* (1916) 25 Yale L. Journ. 599, at 612. It will be noted, however, that in section 15 of the Army Appropriation Act of June 18, 1878, 20 Stat. 152, the Congress limited the uses to which the army could be put. That section provides as it appears in the Code (U.S.C. title 10, sec. 15):

> "It shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding $10,000 or imprisonment not exceeding two years or by both such fine and imprisonment."

Taft refers to this section in the above cited article at page 611.

16. For full discussion of the Greytown incident see Moore, Digest of International Law (1906 Gov't. Printing Office) Vol. II, page 414.

17. *Durand v. Hollins*, (C.C. S.D. N.Y. 1860) Fed. Case No. 4186.

18. Moore, Digest of International Law (1906 Gov't. Printing Office) Vol. I, page 278 *et seq.*; Nevins, Hamilton Fish—The Inner History of the Grant Administration (1936) chapters XII, XIV, XV.

19. Cleveland's Proclamations of July 8 and 9, 1894, and his Message to Congress on December 3, 1894, in Richardson, Messages and Papers of the Presidents (1898 Gov't. Printing Office) Vol. IX, pages 499-501, and 523 at 535. See also correspondence between Governor Altgeld of Illinois and President Cleveland on this matter in Nevins, Letters of Grover Cleveland (1933) pages 357-362; see debate on Senate Resolution approving the President's action in this incident (1894) 26 Cong. Rec. 7280-7284. The resolution was passed.

In the case of *In re Debs*, (1895) 158 U.S. 564, the Supreme Court ruled that President Cleveland's action was authorized and said (at page 582):

> "• • • The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws."

It will be noted that when President Cleveland took this action section 15 of the Act of June 18, 1878, 20 Stat. 152 (U.S.C. title 10, sec. 15), referred to in note 15, was in effect.

20. President McKinley's message to Congress on December 3, 1900, in Foreign Relations 1900 (1902 Gov't. Printing Office) page IIX, *et seq;* Bailey, Diplomatic History of the American People (1940) pages 528-529; Elihu Root, Military and Colonial Policy of the United States (1916) pages 333-347.

21. Baker, Woodrow Wilson (1931) Vol. IV, page 324-334. Bailey, Diplomatic History of the American People (1940) pages 606-607. President Wilson asked Congress for authority to intervene in Mexico, which was granted. However, the bombardment of Vera Cruz took place the day before the Senate voted to authorize intervention. The House had already so voted. See Joint Resolution of April 22, 1914, 38 Stat. 770, which states:

> "*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President is justified in the employment of the armed forces of the United States to enforce his demand for unequivocal amends for certain affronts and indignities committed against the United States.
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> "*Be it further resolved*, That the United States disclaims any hostility to the Mexican people or any purpose to make war upon Mexico."

22. Richardson, Messages and Papers of the Presidents (1897 Gov't. Printing Office) Vol. V, page 507.

of War Stimson to take over and operate the North American Aviation Company plant and produce the aircraft called for by its contracts with the United States.[23]

Not far from here, on a hillside near the village of Lake Placid, John Brown is buried. His grave reminds us of the fight to free the slaves. It is well to remember that Abraham Lincoln justified his Emancipation Proclamation liberating slaves in the states in rebellion on the ground it was within his authority as Commander in Chief.[24] When he was attacked for usurping a power he did not possess, Lincoln replied:

> "You say it is unconstitutional. I think differently. I think the Constitution invests its Commander-in-Chief with the law of war in time of war. The most that can be said, if so much, is, that slaves are property. Is there, has there ever been, any question that by the law of war, property, both of enemies and friends, may be taken when needed? And is it not needed whenever taking it helps us or hurts the enemy? * * *"[25]

A President possessed of determination to preserve democratic processes must employ all his powers with the boldness of a war executive in a period of national danger and unlimited emergency.

II

Powers to Control Foreign Affairs

The President's powers as Commander in Chief are, however, no more impressive than his powers to control foreign affairs.

In 1800 John Marshall, who was then a Member of the House of Representatives, said:

> "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[26]

The Constitution vests in the President the appointment of ambassadors, ministers, and consuls, by and with the consent of the Senate.[27] However, since Washington's time the President has designated special or private agents to carry on diplomatic functions without consulting the Senate. Thus, Washington employed Gouverneur Morris to confer with the British Government concerning its further performance of its obligations under the treaty of peace,[28] and Andrew Jackson sent a special commission to Turkey.[29] The activities of Colonel House on behalf of President Wilson and of Norman Davis on behalf of President Roosevelt are matters of common knowledge.

Although the Constitution also vests in the President power to make treaties, with the concurrence of two-thirds of the Senate,[30] he alone negotiates them.[31]

The Constitution is silent on the President's power to make international agreements, other than treaties, without the consent of the Senate. It does, however, distinguish between treaties and agreements. It prohibits the states from making any treaty with foreign governments,[32] although it authorizes the states to make agreements with foreign governments with the consent of the Congress.[33]

It is frequently difficult to distinguish in nature or importance between a treaty and an executive agreement. But the power to enter into important international engagements without the consent of the Senate has been asserted by several Presidents and is now well established.

This power to make executive agreements arises not only from the President's control over foreign affairs, but also from his military powers, and those great residual powers which inhere in the President as the Chief Executive of the Nation.[34]

The Rush-Bagot Convention between the United States and Great Britain, which limited the naval armaments of both countries on the Great Lakes, was entered into by the mere exchange of notes in 1817 and was not submitted as a formal treaty to the Senate until a year later.[35]

Similarly, between 1882 and 1896, executive agreements were entered into whereby the United States and Mexico undertook to permit the regular troops of each country to cross the boundary line of the other when in pursuit of Indians.[36]

The important executive agreement providing for the Open Door in China[37] and the Lansing-Ishii Agreement recognizing special interests by Japan in China[38] were neither previously authorized by the Congress nor subsequently submitted to the Senate for ratification.

The so-called gentlemen's agreement relating to Japanese immigration into the United States provided a friendly and satisfactory solution of a most vexatious problem without formal action by the Senate or the Congress.[39] In fact, it is now generally agreed that this happy solution was vitiated by the action of the Congress in passing the Japanese Exclusion Act.

Even the substance of an unratified treaty may be included in an executive agreement and the agreement performed, regardless of ratification by the Senate. Thus, after the bloody disturbances in 1905 throughout the

23. Executive Order No. 8773 of June 9, 1941, 6 Fed. Reg. 2777.
24. Proclamation of January 1, 1863, 12 Stat. 1268.
25. Letter to James C. Conklin, dated August 26, 1863, Nicolay and Hay, Abraham Lincoln—A History (1890) Vol. VI, page 431.
26. Annals of Congress, Vol. 10, column 613. Speech was made in connection with the Robbins extradition affair.
27. Article II, Section 2, Clause 2.
28. See letter from Washington to Morris dated October 13, 1789. Writings of George Washington (1836 Sparks ed.) Vol. X, page 43.
29. Moore, Digest of International Law (1906 Gov't. Printing Office) Vol. IV, page 453.
30. Article II, Section 2, Clause 2.
31. *United States v. Curtiss-Wright Export Corp.*, (1936) 299 U.S. 304, 319. Originally, however, President Washington met with the Senate to get the advice of that body on the terms of treaties, but that practice was discontinued. Writings of George Washington (1836 Sparks ed.) Vol. X, page 26 note.
32. Article I, Section 10, Clause 1.
33. Article I, Section 10, Clause 3.
34. See in this connection the opinion by Attorney General Jackson to the President with respect to the acquisition of Naval and Air Bases in exchange for over-age Destroyers on August 27, 1940, opinion No. 134.
35. Moore, Digest of International Law (1906 Gov't. Printing Office) Vol. V, pages 214-215.
36. Ibid. at page 212.
37. Ibid. at page 533 *et seq.*; see also McClure, International Executive Agreements (1941) page 98.
38. Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and other Powers 1910-1925 (Sen. Doc. No. 348, 67th Cong., 4th Sess.) page 2720-2721; McClure, International Executive Agreements (1941) page 99.
39. Foreign Relations 1921 (1936 Gov't. Printing Office) Vol. II, page 329; Corwin, The President—Office and Powers (1940) 236.

Dominican Republic, Theodore Roosevelt proposed that the United States should collect Dominican customs and allocate part of the receipts for payment of Dominican debts and the rest for the Dominican expenses. He submitted a treaty embodying this proposal to the Senate, but after a long debate the Senate adjourned without ratifying it.

The President then included the terms of the treaty in an executive agreement, and for twenty-eight months the program continued in operation under that agreement.[40] Later, this precedent was followed in executive agreements with other Latin American countries and in Liberia.[41]

A few years ago the Litvinoff Agreement by which the Soviet Government assigned to the United States all its claims against American nationals was held by the Supreme Court of the United States to be fully warranted under the Constitution.[42]

The recent acquisition by President Roosevelt of naval and air bases in the Western Hemisphere in exchange for fifty destroyers could be justified not only on the basis of power delegated to the President by statute, but also on the basis of his constitutional powers, either as Commander in Chief or as the official charged with the control of foreign relations.[43]

In fact, Attorney General Jackson in his opinion advising the President that the acquisition was authorized, rested its validity partly on the President's power over foreign relations and cited as authoritative the opinion of the Supreme Court in the *Curtiss-Wright* case.[44] In that case, Mr. Justice Sutherland said:

> "It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[45]

It is important in this connection to emphasize again what Mr. Justice Sutherland asserted earlier in this opinion, namely, that although the Federal Government has only enumerated powers in respect of domestic affairs, its powers of external sovereignty do not depend upon the affirmative grants of the Constitution."[46] The powers of the Federal Government over foreign relations which are not otherwise defined or allocated in the Constitution are for the President to exercise.

Certainly the Congress, the limits of whose authority are set forth in the Constitution, is not the proper body to exercise such powers. "The transaction of business with foreign nations," said Jefferson, "is Executive altogether."[47]

This residual power over foreign relations vested in the President is closely related to his residual power to protect and preserve the Union.

III
Residual Powers to Protect the Union

Speaking before the American Bar Association at Saratoga Springs in the summer of 1917, Charles Evans Hughes pointed out that "the framers of the Constitution did not contrive an imposing spectacle of impotency. • • • Self-preservation is the first law of national life and the Constitution itself provides the necessary powers in order to defend and preserve the United States."[48]

It is true that at the time of the drafting of the Constitution many persons were fearful of a strong Executive. This attitude grew mainly from the fear that such an establishment might develop into monarchy.

Notwithstanding this fear that the Presidential chair might be converted into a kingly throne, the framers recognized that a republic can not long exist without great powers in a Chief Executive.

The idea that a vigorous Executive is inconsistent with the genius of representative government was emphatically repudiated by Hamilton. Urging the necessity of conferring adequate power upon the President, Hamilton wrote in *The Federalist:*

> " • • • Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. • • •
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> " • • • A feeble Executive implies feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill-executed, whatever it may be in theory, must be, in practice, a bad government."[49]

The power which has been delegated to the Federal Government is exercised through the three great coordinate branches—the President, the Congress and the courts. Legislative powers are vested in the Congress by the first section of Article I of the Constitution, and it is noteworthy that it has no powers other than those enumerated in that Article. The exact language is: "All legislative powers herein granted shall be vested in a Congress."

Similarly, Article III of the Constitution carefully limits the grant of power to the Federal judiciary.

When, however, we turn to the grant of power to

40. Bailey, Diplomatic History of the American People (1940) 558-559.
41. McClure, International Executive Agreements (1941) page 94.
42. *United States v. Belmont*, (1937) 301 U.S. 324. Other examples of executive agreements made without concurrence of the Senate and without previous legislative authorization are: the Lawrence-Palmerton Agreement 1850-1851 by which Horseshoe Reef in Lake Erie was acquired from Britain for lighthouse purposes; the Katsura-Taft Agreement of 1905 whereby the United States practically agreed to ally herself with Japan and Great Britain with respect to peace in the Far East and gave Japan a free hand for control in Korea; Agreement with Turkey restoring diplomatic and consular relations after Senate failed to ratify Treaty of Lausanne.
43. Opinion of Attorney General Jackson of August 27, 1940, No. 134.
44. (1936) 299 U.S. 304.
45. Ibid. at 319, 320.
46. Ibid. at 315.
47. April 24, 1790. Writings of Thomas Jefferson (1854 H. A. Washington ed.) Vol. 7, page 465.
48. (1917) 42 A.B.A. Rep. 232.
49. No. 70 of The Federalist.

the Executive under Article II of the Constitution we find that there is no similar restriction on the executive power vested in the President.

The exact language of the Constitution is: "The executive power shall be vested in a President of the United States of America."

Hence, it is manifest that so much of the power of the United States not enumerated in the grant to the Congress or not included in the defined extent of the judicial power, is vested in the President. In other words, the President is the repository of the residual Federal power.

This doctrine is not new. In the first of his *Pacificus Papers,* which appeared on June 29, 1793,[50] Hamilton defended the right of the President to issue a neutrality proclamation with respect to the war between France and England. It may seem surprising in some quarters that the issuance of this first neutrality proclamation brought down on the head of George Washington untold abuse and bitter charges of usurpation and dictatorship.

Hamilton, however, found power to issue the proclamation in the President's residual authority. The right to remain neutral, being a recognized attribute of Federal sovereignty, there remained only the question: What branch of the Government should make the proclamation? It was obvious that such action did not fall within the province of the judiciary. Nor did the powers of Congress as enumerated in the Constitution cover the situation.

"A correct mind," said Hamilton, "will discern at once, that it can belong neither to the legislative nor judicial department, and therefore of course must belong to the Executive."[51]

This residual power is particularly important in times when the safety of the whole nation is threatened.

Chief Justice Marshall recognized the existence of the power of national self-preservation in the early case of *Cohens v. Virginia,*[52] and the Supreme Court later reiterated this position in the *Legal Tender Cases.*[53]

The very form of oath set forth in the Constitution under which the President swears that he will to the best of his ability preserve, protect, and defend the Constitution of the United States[54] supports this view. The Constitution did not contemplate imposing on the President a duty and simultaneously withholding from him the means and the powers with which to perform that duty.

Our great Presidents have never hesitated to do whatever was necessary for the preservation of the Union. Abraham Lincoln, on taking office, was suddenly confronted with a rebellion that threatened to disrupt the whole Union. Congress was not in session. Immediate action was necessary.

Abraham Lincoln took that action. By Executive Order of April 25, 1861, the President directed that, if the Maryland legislature should take action to arm the people of that state against the United States, prompt and efficient steps to counteract such action would be taken, even to the bombardment of Maryland cities.[55]

By proclamation of May 3, 1861, President Lincoln increased the Regular Army by adding 22,714 officers and men. He increased the Navy by directing the enlistment of 18,000 men.[56]

He ordered two million dollars to be advanced out of the Treasury, without security, and paid to persons whom Congress had not authorized to receive it.[57]

And he suspended the writ of *habeas corpus.*[58] When what Lincoln had done was attacked as unauthorized, he made his classic reply:

> "Are all the laws but one to go unexecuted, and the Government itself to go to pieces lest that one be violated? Even in such a case, would not the official oath be broken if the Government should be overthrown when it was believed that disregarding the single law would tend to preserve it?"[59]

Lincoln, like the framers of the Constitution, was well aware of the dangers inherent in a weak Executive. The framers did not want to see the history of state governments during the critical years repeat itself in the new Federal Government. Governors had been reduced to legislative puppets; judges had been made dependent upon legislators for their subsistence in of-

50. Works of Alexander Hamilton (1885 Henry Cabot Lodge ed.) Vol. IV, page 135.

51. Ibid. at page 139. President Theodore Roosevelt went further than did Hamilton when he said in his "Autobiography":

> "The most important factor in getting the right spirit in my administration, next to the insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its constitutional powers. My view was that every executive officer, and above all every executive officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power, but I did greatly broaden the use of executive power. In other words, I acted for the public welfare, I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition. I did not care a rap for the mere form and show of power; I cared immensely for the use that could be made of the substance." Works of Theodore Roosevelt (1926, National Edition) Vol. XX, p. 347-348.

Compare, however, Corwin, The President—Offices and Powers (1940) 131-136.

52. (1821) 6 Wheat. 264, 387.

53. (1870) 12 Wall. 457, 553.

54. Article II, Section 1, Clause 8.

55. Richardson, Messages and Papers of the President (1897 Gov't. Printing Office) Vol. VI, pages 17-18.

56. Ibid. at pages 15, 16.

57. Message by President Lincoln to the Senate and House of Representatives May 26, 1862. Richardson, Messages and Papers of the Presidents (1897 Gov't. Printing Office) Vol. VI, pages 77, 78.

58. Richardson, Messages and Papers of the Presidents (1897 Gov't. Printing Office) Vol. VI, pages 18, 19.

59. Message to special session of the Congress on July 4, 1861. Richardson, Messages and Papers of the Presidents (1897 Gov't. Printing Office) Vol. VI, pages 20, 25.

fice; and civil rights, such as trial by jury, had been extensively violated.[60]

"One hundred and seventy-three despots would surely be as oppressive as one,"[61] wrote Madison, gravely disturbed by developments. That great believer in democratic rule by the people spoke the thoughts of the framers when he wrote in *The Federalist:*

> "In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire. In a democracy, where a multitude of people exercise in person the legislative functions, and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended on some favorable emergency, to start up in the same quarter. But in a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions."[62]

In countries like France the subjection of the executive to a legislature torn by faction and given to intrigue and petty political bickering made a mockery of democratic government. A government which cannot govern, which even in normal times cannot cope with the complex problems of modern industrial society, is a pushover for dictators in time of crisis.

It was not because the executive was too strong in Germany, Italy, France, and Spain that these countries succumbed to dictatorship.

On the contrary, it was because the executive was reduced to little more than a puppet of the legislature.

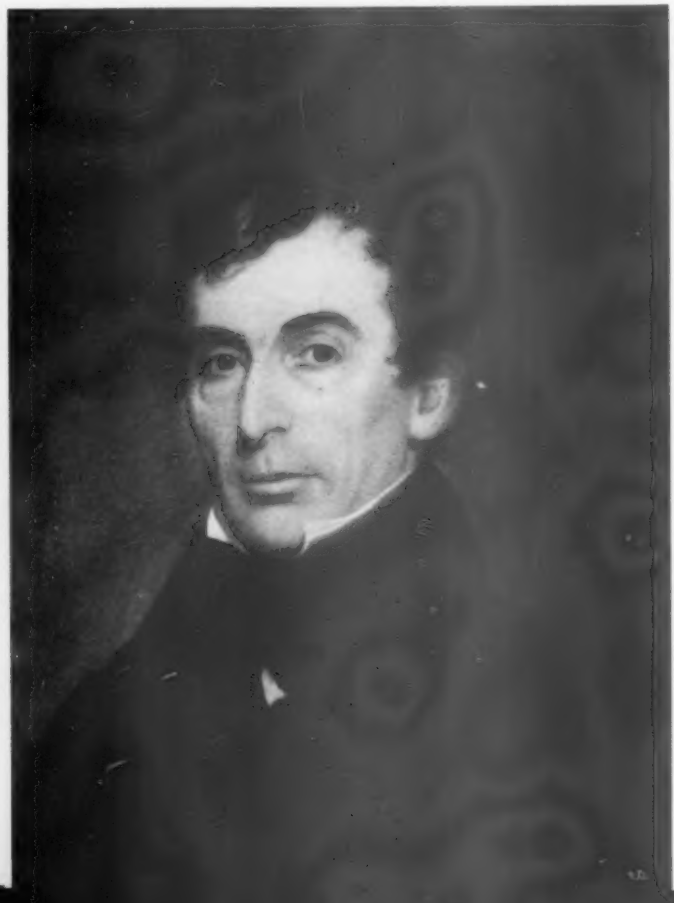
By way of contrast, the heroic resistance of the English people during the present war has been made possible in no small degree by the powers which have been conferred upon the Prime Minister and his cabinet.

In every time of great national emergency which calls for dynamic and courageous leadership there are always those who pretend to see in such leadership the threat of dictatorship. Fortunately for us these timid souls are in a minority now, as they were in the days of Washington and Jefferson, Jackson, Lincoln and Wilson.

The "last frontier of democracy" is even now at the English Channel. We in the United States have constituted ourselves the arsenal for the defense of that frontier. Fancied fears of dictatorship at home should not blind us to the real threat arising from the upsurge of tyranny abroad.

We lawyers have a peculiar responsibility to avoid the kind of distortion which represents the exercise of the powers of national self-preservation by the President as a threat to our democracy. The framers of the Constitution were not unmindful of the dangers this nation would encounter in the unfolding future. But they had the faith and vision to see that the power to govern in the hands of a responsible executive was a necessary condition of survival. It is for us to show the same faith and the same vision today.

60. See, for example, the discussion with respect to Pennsylvania in No. 48 of The Federalist by James Madison.
61. No. 48 of The Federalist.
62. Ibid.



CHIEF JUSTICE TANEY

The number of good pictures of Chief Justice Roger Brooke Taney is few. Among them is an original painting by Henry Inman owned by Mr. Gurney E. Newlin, a former President of the Association, a member of our Board of Editors, which we reproduce here.

Warren, in his treatise on the Supreme Court, gives a fair estimate of Taney when he says:

> "History has recorded a very different verdict upon his place in the annals of the legal history of the country from that which Sumner and Wilson [the senators from Massachusetts] endeavored to establish. 'Before the first term of my service in the Court had passed, I more than liked him; I loved him,' said Judge Miller, later. 'And after all that has been said of that great good man, I always stand ready to say that conscience was his guide, and sense of duty his principle.'"

Chief Justice Hughes at the conclusion of his address at the unveiling of a bust of Taney at Frederick, Md., in 1931, said:

> "With the passing of the years, and the softening of old asperities, the arduous service nobly rendered by Roger Brooke Taney has received its fitting recognition. He bore his wounds with the fortitude of an invincible spirit. He was a great Chief Justice." (17 A.B.A. J. 785.)

LAWYERS AS LEADERS IN A DEMOCRACY

[*The following item is an excerpt from the Annual Report of Dean Everett Fraser of the Law School of the University of Minnesota. His keen analysis of the lack of leadership in those Democracies which have gone down before the dictators will be read with interest by all students of government. His comment about lawyers as the leaders in a Democracy is stimulating and convincing.*—ED.]

Lack of Effective Leadership in Democracies

HISTORY records few periods marked by such world-shaking developments as have occurred in the last decade. Dictatorships have displaced governments of the people. Government by law has been discarded in favor of government by men. International law and treaties have been flouted. The liberties and values which free men had come to take for granted have been in many countries destroyed and are everywhere in danger. Faced by perils, the democracies have been confused in thought, divided in council, and shrinking from realities. Unable to unite for their common defense, one by one they have been overwhelmed by the dictatorships.

Many causes, immediate and remote, may be found for this world revolution and holocaust. *But there is one ultimate cause, and that is lack of sound and effective leadership. Democratic governments have been destroyed primarily because they failed to remedy the ills of their peoples.* There were a few great leaders who knew how to diagnose the world's illness and to prescribe remedies. Had the counsels of men like Wilson, Briand, and Stresemann been heeded, the world might have been saved from the valley of death. But their efforts were thwarted by selfish men more concerned with holding office than with the welfare of peoples. They knew it was easier to arouse fear of new experiments than to inculcate a vision of a better world. Some were doubtless sincere, but lacking in vision. The world suffers from stupid leadership as well as from selfish leadership. Where there is no vision the people perish.

If the democratic form of government is to compete successfully with the dictatorship, means must be found for getting public-spirited capable men in government. The people must be educated to select such men and to leave the choice of policies to them. Representative government must be restored. Such a program requires leaders not only in the chief offices, but also in every precinct. We can learn something about organization from the dictators, but we should plan not to order and to compel, but to educate and to lead.

The Lawyer's Function in Society

In the early days of our country, lawyers were preeminent in furnishing counsel and guidance to the people, not only in private affairs, but also on public questions. They were assumed to be the guardians of whatever learning there was in those times. They were learned in the history and principles of government, ethics, and philosophy. With the advent of the industrial era and the corporation, the ablest lawyers turned their attention to business and neglected government. They became business men rather than professional men. They have left the task of government to their less able brothers who have sought in politics a chance of a livelihood. There are many lawyers still in political life, but, with a few notable exceptions, the leading intellects of the bar are not in their ranks.

We need to revive the old conception of the lawyer's function in society.

Law, in its broadest conception, is the means designed to enable men to live together in peace, man with man, group with group, nation with nation. Thus conceived, it envelops humanity. It includes government in all its subdivisions and branches; the principles upon which human institutions are based; the rules designed for the peaceful settlement of disputes; the agencies that make the rules—legislative, administrative, or judicial; and the agencies that administer them. All these institutions, national or international, are within the compass of law and are the proper concern of the lawyer.

Justice is the ideal which the law is designed to achieve, but which it never quite attains. Our conception of what is just is constantly changing. It is radically different today from what it was one hundred, or even fifty, years ago. Criminal law and labor law will readily come to mind. The causes of change may be the enlightenment through newly acquired knowledge, such as psychologists have given us concerning human behavior, or they may be changed conditions in the world about us, such as the rise of the industrial era.

Law and the Life of a People

Certain it is that law is not preordained. There has never been, there will never be, a set of institutions and rules that will fit all peoples at all times, and that will satisfy their sense of justice under all conditions. Governments, institutions, and laws—*the law* as we conceive it—are the expression of the life of a people; they do not mold that life. Laws that attempt to coffin and confine that life will be burst asunder. The human spirit, the human will, are stronger than any law. Laws may cramp and restrain that spirit for a time, but that time will have an end. History teaches us that there is one and only one law of human relations that is constant, and that is the law of change. The law that will suit a given people at a given time is determined by the ideas, temperament, habits, and conditions of that people at that time. Thus the law must vary with the people concerned, and, for a given people, from time to time.

PUBLIC SERVICE BY THE BAR

By ELIHU ROOT

[*In 1916 Elihu Root was President of the American Bar Association. The world was then at war as it is today. The problems and tribulations which beset the country were much the same as those which now confront us. Everybody was hoping then that our country could stay out of the armed conflict, just as that is the hope of everyone today. But the impact of the world at war was everywhere felt in our nation, just as it is felt today. The annual meeting of the Association was held in Chicago in the latter part of August. Those lawyers who heard President Root's memorable presidential address will never forget it or him. Here are words of comfort and advice from a true statesman which have perennial worth and application. The respect and admiration of the American Bar for Elihu Root has increased with time. It seems fitting to reprint the more pertinent parts of that notable address.*—ED.]

"One of the most striking effects of the great war is the extraordinary increase of national efficiency which has followed the spur of necessity.

• • •

A new gospel of patriotic service has replaced the cynicism of privilege and personal advantage.

• • •

This change relates not merely to military efficiency but to the whole social economy and extends throughout the field of production and to all forms of consumption and waste. It carries a sense of individual responsibility by each citizen to help make his country strong by production and by conservation.

• • •

When the war is over we shall find ourselves in a very different world.

• • •

In the amazing developments of these years there are lessons for us to learn which we must not ignore. There are lessons not merely as to submarines and aeroplanes and high explosives, but as to the whole effective capacity of the nation by which it maintains its place and progress in the world in peace as in war. No human power can withhold the people of the United States from taking part in the international competition which will follow the return of peace. It is not a matter of volition. It cannot be controlled by legislation or by change of parties or by voting. The entire community of civilized nations is going through a phase of development from which no one of them can escape and continue to hold its own, and one of the necessary incidents of that development is competition in production and trade. The United States must therefore be prepared to meet competition carried on more effectively than ever before. The power of organization will be at its highest; the advantages of applied science will be greatest; the hindrances of internal misunderstanding and dissension will be at a minimum.

• • •

It is plainly the duty of all Americans, whatever their calling, to consider by what means they can contribute through either the increase or the conservation of power in their own fields of action, towards the permanent higher efficiency of the people of the United States.

There is no body of citizens to whom this duty should appeal more strongly than to the lawyers, because the subject vitally affects the relations between the individual and the state regulated by law and the fundamental conceptions upon which our system of government is based.

There are two relevant truths of universal application and appeal. One is, that the people of the United States need in one important respect a change of the individual attitude toward their government. Too many of us have been trying to get something out of the country and too few of us have been trying to serve it. Offices, appropriations, personal or class benefits, have been too generally the motive power that has kept the wheels of government moving. Too many of us have forgotten that a government which is to preserve liberty and do justice must have the heart and soul of the people behind it—not mere indifference. Too many of us have forgotten that not only eternal vigilance but eternal effort is the price of liberty. Our minds have been filled with the assertion of our rights and we have thought little of our duties. The chief element of strength which the nations of Europe are acquiring is the spirit of their people, who have learned a new loyalty of devotion and sacrifice for their country. In a world where that spirit prevails the United States will slip back in the race unless we, too, have a new birth of loyalty and devotion.

The second general truth is, that national strength requires the spirit of solidarity among the people of the nation. Sectional or class misunderstanding and hatred or dislike are elements of vital weakness. To be strong a nation's citizenship must be a title to friendship and kindly interest among all her citizens. In a strong nation her people will be one for all and all for one. Every part of a country grows stronger with the prosperity of every other part. National wealth and prosperity are made up of the wealth and prosperity of individuals, and we cannot pull down each other without suffering as a people. The rights and privileges, the property and liberty and life of every American, whether he be at home or in Mexico or in the Far East, on land or sea, are our concern and the concern of each of us. Prosperity to him is a benefit to us; misfortune to him is a loss to us; and it is vital to each one of us that we shall have such a country and such a government as shall put power and prestige and honor and active interest and inflexible resolution into the protection of every American whose necessities may come by circumstances to demand the performance of his nation's duty. Whenever a part of a people give themselves up to envy and jealousy of another part that may

seem more prosperous, whenever a part of a people seek to equalize conditions by pulling down rather than by building up, the power of the nation begins to wane and the forces which should make the nation great and effective are impaired and wasted by internal controversy and diminished patriotism.

* * *

The development of our law under the conditions which I have pointed out will be accompanied by many possibilities of injurious error. There will be danger that progress will be diverted in one direction and another from lines really responsive to the needs of the people, really growing out of their life and adapted to their character and the genius of their institutions, and will be attempted along the lines of theory devised by fertile and ingenious minds for speedy reforms. Ardent spirits, awakened by circumstances to the recognition of abuses, under the influence of praiseworthy feeling, often desire to impose upon the community their own more advanced and perfect views for the conduct of life. The rapidity of change which characterizes our time is provocative of such proposals. The tremendous power of legislation, which is exercised so freely and with little consideration in our legislative bodies, lends itself readily to the accomplishment of such purposes. Sometimes such plans are of the highest value. More frequently they are worthless and lead to wasted effort and abandonment. The test of their value is not to be found in the perfection of reason. Man is not a logical animal, and that is especially true of the people of the United States and the people of Great Britain, from whom our methods of thought and procedure were derived. The natural course for the development of our law and institutions does not follow the line of pure reason or the demands of scientific method. It is determined by the impulses, the immediate needs, the sympathies and passions, the idealism and selfishness, of all the vast multitude who are really from day to day building up their own law. No matter what legislatures and congresses and publicists and judges may do, the people are making their own law today as truly as in the earlier periods of the growth of the common law. No statute can ever long impose a law upon them which they do not assimilate. Whether repealed or not, it will be rejected and become a dead letter. No decision that is inconsistent with their growth can long resist the pressure to distinguish and overrule. What can be done, what must be done to make true and uninterrupted progress is that those members of the democracy to whom opportunity has brought instruction in the dynamics of law and self-government, shall so lead and direct the methods of development as to respond to the noblest impulses, the highest purposes, the most practical idealism, of this great law-making multitude, so that the growth of the law shall receive its impetus from the best and not from the worst forces of the community, and be guided by the wisdom and not the folly, the virtues and not the vices, of the people.

* * *

What part is the Bar to play in this great work of the coming years? Can we satisfy our patriotism and be content with our service to our country by devoting all our learning and experience and knowledge of the working of the law and of our institutions solely to the benefit of individual clients in particular cases?

* * *

Have we never really cared about law and justice except as available instruments to get particular clients out of trouble? Is the Bar doing its duty and playing its part in the development of the law?

* * *

The questions involved in the development of the law are seldom adapted to interest an audience in political discussion. The real consideration and discussion and the mature conclusions worthy to be followed must be among the practitioners, the judges, the teachers of the law. The fitness of a people for self-government is measured by their capacity to set up and maintain institutions through which government can be carried on effectively, and responsibly. That rule applies to all large bodies of free agents having a common purpose. It applies to the 114,000 lawyers of the United States. We must have institutions through which our duty can be done if it is to be done. In response to that necessity came the associations of the Bar—the six hundred local and state associations and this great national organization. Here is at hand an institution for the public service of the profession of the law. To enlarge its membership, to improve its procedure, to increase its scope and efficacy, to strengthen its authority and its appeal in the real life of our time—these are steps by which the lawyers of all the states may rise to the high level of patriotic duty and a dignity of service worthy of a true American Bar."

Advance-Sheet Service

From the April, 1941, issue of the Illinois Bar Journal we clip the following item:

> To enable younger members of the bar to keep in touch with current judicial decisions during their period of military service, the Section on Younger Members Activities announces completion of arrangements with West Publishing Company to provide all members of the Illinois State Bar Association who may be drafted or otherwise enter military service, advance sheet service covering the Illinois edition of the North Eastern Reporter and the United States Supreme Court Reporter, during the period of their military service.

The JOURNAL is advised that lawyers throughout the country who are in service may secure without cost a similar privilege by making application to the secretary of their state bar association.

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The Supreme Court Appointments

IN BRINGING together for publication "The Constitutional Decisions of John Marshall" (1905), the late Joseph P. Cotton, Jr., of the New York Bar, made the significant observation that "save Washington, Hamilton and Lincoln, no American stands higher (than Marshall) as a constructive statesman in the work of the evolution of the Union"; and he added that

> "It is the peculiarity of this work of statesmanship that—practically without exception—all of it found expression in the course of judicial opinions as Chief Justice."

The impressive position of the Supreme Court in the expert discharge of duties transcending even the fair arbitrament of private controversies made it, from the first, "the keystone of our political fabric," in Washington's phrase, and led Mr. James Bryce to say that "The Supreme Court is the living voice of the Constitution—of the will of the people as expressed in the fundamental law." The same considerations caused Dr. Von Holst to point out, in the opening paragraph of his "Constitutional Law of the United States," that, under the American system—

> "If the statesman is bound to be, in the practical discharge of his duties, a conscientious jurist, the jurist must, in his work of examination and testing, always keep in mind the point of view of the statesman."

In these days when the emotions of lawyers and laymen alike are stirred deeply by the retirement of beloved Chief Justice Hughes, there is widespread interest in the personalities and the backgrounds, as well as the aptitude for judicial statesmanship, of the lawyers who are taking the vacated seats in the great Court. No less than at any other time in our history, the Court is the outstanding symbol of the American system—the embodiment of the ideals of liberty and justice for which America stands now in battle array, to fend off the challenge of foes to whom the very existence of such a tribunal is repugnant. The strength and statesmanship of the Court are as vital as ever to America, if our historic rights and liberties, and the American system of individual opportunity under free private enterprise, are to survive the ordeal of total preparation for defense and possibly the conduct of war.

Under these circumstances, this issue of the JOURNAL is devoted largely to the new Chief Justice and the two new Associate Justices. The elevation of Mr. Justice Stone has been most satisfying to the profession and the country and is so manifestly appropriate as to cause no disappointment to any other aspirant. Continuity and firmness in the handling of the exacting work of the office, as well as a cooperative spirit in the tasks of conference and decision, are assured by the personality of the experienced successor to Chief Justice Hughes. He has grown steadily in stature, and in the respect and affection of the Bar and country, since he was appointed to the Court by President Calvin Coolidge. What Clarendon said of Cromwell may be applied to him, "that as he grew towards place and power all of his qualities revealed themselves."

The new Associate Justices come to the Court with the prestige of considerable experience at the Bar and a marked capacity for achievement in the arena of practical statesmanship. Like many of the ablest members of the Court in its history, their training and experience have been chiefly as legislators or as lawyers in public office and private practice. Both have shown an instinctive questioning of legal concepts which, as Woodrow Wilson said of international law, have been "sometimes a little too much thought out in the closet." As did the new Chief Justice, Mr. Justice Jackson ascends the bench from the Attorney-General's office, after a brilliant career in many posts of professional opportunity. As did Edward Douglass White, George Sutherland, and Hugo Black, Mr. Justice Byrnes comes to the Court from the Senate of the United States, where he manifested a grasp of the business of government and an expertness in the processes of legislative accomplishment. Both are men, who, from humble beginnings, have made their own way boldly and far, under the free institutions which they have helped to preserve and adapt. The whole country will watch with keen and kindly interest the development of their judicial service as the culmination of their already distinguished careers.

More Efficient Methods of Court Procedure

WE come again to the season of summer vacation and the lawyers' work before the judicial tribunals comes to a welcome period of rest.

In this interval of relief from the engrossing tasks of advocacy it may be convenient and profitable to consider some of the changes that are taking place in that part of the lawyers' activities which come before the courts, and to appraise the results of the united efforts of bench and bar for the improvement of the administration of justice.

It has become increasingly evident that great changes are being made in the methods employed for the conduct

of litigation. Those changes have come because the old methods have failed to meet the needs of the day. A period of more efficient methods of court procedure has followed long tolerance of methods which have at last become intolerable.

Some of the more conspicuous and important recent changes in the methods employed by the courts to meet present needs may here be briefly mentioned.

Perhaps the greatest accomplishment in the efforts to improve procedure has been the enlargement of the rule-making power of the courts. The Act of June 19, 1934 restored that power to the Supreme Court of the United States. Under the authority of that Act, the Court promulgated the Federal Rules of Civil Procedure. Those rules were submitted to Congress and met with such an almost unanimous measure of approval there and by the bench and bar of the whole country, that the campaign for the extension of the rule-making power in the state courts was greatly aided. Broad rule-making power is now exercised by the courts of Arizona, Colorado, Delaware, Idaho, Illinois, Indiana, Maryland, Michigan, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, Rhode Island, South Dakota, Texas, Washington and Wisconsin. Other states have partial rule-making power and in almost every state, committees of the state bar associations are engaged in the consideration and study of measures to enlarge the rule-making power of the state courts.

The Federal Rules of Civil Procedure have now been in full operation for nearly four years. They are the result of a thirty year campaign conducted under the auspices of the American Bar Association reinforced by the efforts of many state bar associations to restore to the federal courts their ancient power. All of us are increasingly impressed by the ease with which the transition from the old system has been made and the genuine and sincere effort which has been made by the bench and bar to attain the simplicity, economy and promptness which were the chief objectives of those rules.

It is also encouraging to observe the growing movement for the assimilation of the state practice to the new federal system. It is hardly to be denied that uniformity in the rules which regulate the methods by which cases are brought into court, tried and disposed of, is highly desirable, except where local conditions require special treatment. The original conformity act was an effort toward that end but failed to meet the situation. Instead, it created two different and inconsistent systems of procedure operating side by side in each state.

The desire for uniformity is again strongly manifesting itself. A new and real conformity is developing as a result of organized nation-wide efforts to assimilate state procedure to that of the federal courts. In Arizona, Colorado, Idaho and Michigan, rules of court have been adopted, closely assimilating state procedure to that of the new federal rules. In many other states the federal rules in regard to pleadings, joinder of parties and claims, pre-trials, discovery, examination of parties, and summary judgments and declaratory judgments, have been formulated into state rules of civil procedure and in most of these states the program is to proceed with the study of all the federal rules and to achieve as close a conformity as the local situation permits.

Formerly there was great disparity in the local rules of the district courts of the United States. Immediately on the going into effect of the Federal Rules of Civil Procedure, the district courts, aided usually by committees of the bar, have been revising their local rules. After the report of Judge Knox's committee and the presentation of eight tentative local rules for the consideration of the district judges, a general revision of local district court rules has been practically completed.

The Supreme Court has taken a second great step toward the improvement of the administration of criminal justice, by the appointment of an Advisory Committee to prepare for and submit to the court, rules of practice and procedure for criminal cases. Editorial reference has heretofore been made to the appointment of that committee and it is gratifying to learn that following the course which proved so successful in securing the cooperation of the bench and bar in regard to the formulation of the Federal Rules of Civil Procedure, the committee has made very substantial progress in a preliminary draft of rules for criminal cases. It is to be expected that its draft will be submitted for the consideration of the bench and bar with an invitation for the submission of suggestions. In this issue is an article by Professor James J. Robinson, the reporter of that committee, which deserves intent reading by every lawyer who is interested in the study of criminal law, either as a practitioner in that field or as one concerned in the public welfare.

The Code of Rules of Evidence which was submitted to the last meeting of the American Law Institute, is another step taken for the modernization and increased efficiency of the administration of justice. The completion of that great program is nearer than could have been deemed possible a year ago. The formulation of court rules, and where necessary the drafting of constitutional amendments and statutes, is likely to be presented not only to the members of the Law Institute but to the bench and bar of the whole country within another year. The debate before the last session of the Law Institute disclosed the keen interest of the bench and bar in the project of simplifying and modernizing the law of evidence. The readers of the JOURNAL will be kept fully informed on that interesting and important matter.

We are now in a period marked by special efforts to make the judicial system operate with the highest efficiency.

CURRENT LEGAL PERIODICALS

By KENNETH C. SEARS

Professor of Law, University of Chicago

Administrative Law

The Final Report of The Attorney General's Committee on Administrative Procedure, by Felix Frankfurter, A. H. Feller, John Foster Dulles, and J. Forrester Davison, in 41 Columbia L. Rev. 585. (April, 1941.)

A piece of fine writing by Mr. Justice Frankfurter constitutes the foreword to the discussion. "The time has come for silly hostilities to cease, for us to give full acceptance to Administrative Law as an honorable and indispensable member of our legal household, instead of continuing to treat it as though it were a subverter." A. H. Feller has warm praise for the method pursued by the Committee and in general for the substance of the report. "Before many years are out the reading and understanding of this Report will be a hallmark of education in the process of government." Exceptions are taken to (1) the opinion that whenever a policy has crystallized within an agency it should be published in a definite form (2) the belief in favor of the practice of holding public hearings in the formulation of rules since this seems to minimize the value of informal conferences; and (3) the "hearing commissioner" proposal which he would amend substantially and thus make doubtful whether the proposal, as amended, would involve any substantial change in the present trial examiner system. The Code of Standards of Fair Administrative Procedure proposed in a minority report submitted by Vanderbilt, Stason, and McFarland is criticized in many particulars and condemned in general as inferior to the vetoed Logan-Walter Bill. John Foster Dulles discusses the proposed legislation that is of general importance. A majority of the committee advocate five major provisions: (1) legalization of the delegation by agency heads of various administrative powers; (2) creation of a permanent office of Federal Administrative Procedure to consist of a director, appointed by the President, a member of the C.C.A. for the District of Columbia, and the Director of the Administrative Office of the U. S. courts. This office would investigate agencies, hear complaints, and recommend legislative action; (3) a group of proposals concerning the publication of rules and regulations including a provision that regulations will become effective only after the lapse of forty-five days from publication; (4) a provision for declaratory rulings which would determine controversies; and (5) the establishment of hearing commissioners, to be nominated by the agency with which they will serve, and to be appointed by the Office of Federal Administrative Procedure for a seven-year term with a substantial salary. This scheme is criticized as not wholly satisfactory because in cases susceptible of an objective determination a person is entitled to an independent judge. But "the hearing commissioners are not really independent." J. Forrester Davison considers the proposed hearing commissioner and questions the picture painted of him in the Committee Report. "Thus at every stage the hearing commissioner seems to be a high grade trial examiner who on every important or novel issue is subject to being overruled in toto in an independent appraisal of the law and the facts by the agency tribunal."

Administrative Law

The Report of The Attorney General's Committee on Administrative Procedure, by Louis L. Jaffe, in 8 U. of Chicago L. Rev. 401. (April, 1941.)

Professor Jaffe uses forty pages for his discussion of the work and recommendations of the Attorney General's Committee. Thus, he had the space necessary for a reasonably thorough discussion and he organized his material in a way that gives a better idea of the subject than the several criticisms that appear in the Columbia Law Review. Here are the sub-topics discussed by Jaffe: Administrative Information (publication of rules and procedures; shall formulation of rules be mandatory?; declaratory rulings); Informal and Pre-Hearing Procedures (pleadings and notice; publicity in individual cases); Formal Adjudication (right to hearing, status of adjudicating officer; whether decision will be collective or personal; evidence, official notice, and cooperation of staff); Judicial Review of Administrative Adjudication (right to review; courts and methods of review; scope of review); Administrative Rule-Making (procedure; judicial review); Office of Federal Administrative Procedure. Despite some criticism of particular recommendations, the Report of the Committee is warmly praised and the nation, saved from the error of the Logan-Walter Bill, may now proceed to rational reform. "In the Attorney General's Committee report, at least, both in its professions and in its recommendations, I can find nothing to justify the fears of Dean Pound that administrative law and activity is conceived to be simply what the administrator wills at any one moment, uncontrolled by the terms of the delegation and by general conceptions of justice."

Constitutional Law

Circumventing The Fourth Amendment, by J. A. C. Grant, in 14 Southern California L. Rev. 359. (June, 1941.)

The rule of the Weeks case is that evidence secured through an illegal search can not be used in a national

prosecution. Nor will the use of a search warrant justify a search solely for the purpose of securing evidence for use against the person searched in a criminal prosecution. There must be a primary right to seize the property before the evidence can be used. But it is argued that there are so many exceptions to the rule that it has been largely destroyed and now can be easily circumvented by a district attorney willing to pay the price, which is not very high. What are these exceptions? (1) A search and seizure by a private person may be disclosed to and used by the prosecution. (2) Likewise, the activity of state officers may be used by the national government unless national officers have participated in this state activity. (3) The most devitalizing exception is that only the person whose rights have been invaded can protest against the use of the illegally secured evidence. As a result the law of search and seizure has become rather antiquated and it has failed to curb illegal searches and unreasonable seizures. Three changes are suggested. The most important is that "the victim of an illegal search should have a right to sue, not only the trespassing officer, but the government, which should be required to underwrite his acts." Quaere. Should Congress be asked to pass a statute that would permit a "victim" to recover a judgment against the United States if the search and seizure proves, or if it is otherwise proved, that he was a violator of the criminal law? Should not the recovery be limited to an innocent "victim" of a violation of the Fourth Amendment?

Constitutional Law

Is Federal Control of Water Power Development Incompatible With State Interests? (A Discussion of The New River Case), by John W. Scott, in 9 The George Washington L. Rev. 631. (April, 1941.)

A member of the Federal Power Commission discusses this challenge: "Immediately following the Court's pronouncement (in the New River case) it was charged that 'every creek in the country' will be under Federal control and 'states rights have been destroyed.'" The categorical answer is that, "Federal control and 'states rights' in water power resources are compatible." A remark by Pinchot is recalled: "the electric power interests were all for Federal control—because there wasn't any. Now these same interests are all for state control—because for nearly all practical purposes there isn't any." The Federal Power Act by defining navigable waters to include streams which, in their natural or improved condition, notwithstanding interruptions compelling land carriage, are used for transportation in interstate or foreign commerce, plus language in the New River case that the constitutional power of the United States is not limited to control for navigation but that flood protection, watershed development, and recovery of the costs of improvements through utilization of power are likewise parts of commerce control, makes it plausible to think that "states rights" over streams are destroyed. Nevertheless, the Commission has found in approximately half of the cases before it that the proposed construction would not affect interstate or foreign commerce and thus that the projects did not require a federal license. But the main protection to states and municipalities is that Congress has carefully refrained in the Federal Power Act from exercising its maximum constitutional authority and by many provisions has protected and given preference to the states. After all, "Nature has no respect for arbitrary state lines."

Jury Trial

The Jury's Agreement—Ideal and Real, by James D. Barnett, in 20 Oregon L. Rev. 189. (April, 1941.)

It is a short article but heavily documented. Observe, however: "Attempt has been made to examine all pertinent reported cases (a great number) but for the present purpose, which is chiefly to find some philosophy of jury agreement, it has seemed generally enough to cite only a few cases, by way of illustration and credit." From the welter of judicial opinion and non-judicial comment, what appears to be the ideal of the jury? This is apparently an acceptable statement: "A verdict . . . is a true response of twelve men to the issues in the case . . . by each juror acting independently and voluntarily in forming his conclusion. The concurrent coincident conclusion of the twelve is the verdict." What is the real situation? Recognition of fallibility, acceptance of the view of others if it is a better view, deference but not too much of it. "A kind of informal 'give-and-take' is thus encouraged, which approaches the 'mere acquiescence' that has been condemned; and this shades off into 'mutual concession' of more or less formal 'compromise,' 'barter,' 'log-rolling.'" So with other disputed devices such as the quotient verdict. What is the remedy? The author is rather diffident but he states that the difficulties "would be greatly diminished by the elimination of the requirement for unanimity in verdict, still generally prevailing." Is no distinction to be made between civil and criminal trials or between the very serious and the less serious crimes?

Legal Biography

Mr. Justice Bradley's Appointment to The Supreme Court And The Legal Tender Cases, by Charles Fairman, in 54 Harvard L. Rev. 1128. (May, 1941.)

The second installment of Fairman's article makes certain conclusions possible. (1) Bradley after his confirmation as a justice of the Supreme Court changed his idea about residing in the Southern circuit to which he was assigned. For this he was accused of a fraud but a lack of sincerity is not shown. (2) He became aware of charges that President Grant had "packed" the court in the appointment of him and Strong. His answer was a denial that he had made known to Grant his view on the Legal Tender Act or that he had given any commitment. (3) Judicial opinions as to the constitutionality of this Act were announced almost without

exception in accordance with political bias. The Republicans held that it was constitutional; the Democrats dissented from this view. "It was a probability amounting almost to a certainty that any Republican lawyer would conscientiously believe that the power to issue legal tender was fairly to be found within the Constitution." (4) President Grant desired to have the constitutionality of the Legal Tender Act sustained; he had "reason to believe" that Bradley was of the same opinion; but he exacted no pledge or expression of opinion from Bradley or Strong. It seems clear that neither would have been appointed if his opinion had been against the Act. (5) Bradley, while his nomination was pending, attended two meetings of the executive committee of The United Companies of New Jersey which considered whether the coupons on the company's bonds should be paid in currency or gold, i.e. whether *Hepburn v. Griswold* should be accepted as the settled law. Without knowing what, if anything, Bradley said at those meetings, his conduct "was certainly censurable." However Bradley is commended for paying for his railroad transportation while it was common for other judges to accept and solicit railroad passes. (6) The reversal of *Hepburn v. Griswold* was anticipated by many lawyers and corporations with bond issues unpaid. (7) "The word 'pack' had an evil connotation but no precise meaning. The specific charge that Grant and Bradley made a bargain has been supported by absolutely nothing more than the loose invective of political opponents and a semblance of plausibility arising from the unusual concatenation of events."

Trade Regulation

Control By Licensing Over Entry Into The Market, by Irwin W. Silverman, L. T. Bennett, Jr., and Irwin Lechliter, in 8 Law and Contemporary Problems 234. (Spring, 1941.)

Interesting and informative is this description of the legislative regulations that restrict the business enterprise of the "small business man." But no solution is offered except by inference. The inference is that since legislative activity of this sort seems inevitable the courts should be less reluctant to declare much of the legislation unconstitutional. The conviction of the authors is that many business restrictions are responses to the activity of pressure groups with selfish motives. The plea that the public health, safety, and welfare must be protected is frequently a pretense. But here is the rub. Many business regulations "have also been prompted by a sincere desire to solve the problem of what to do with small business." Which is which? On this problem the article appears to offer no working rule. Regulation of utility services is approved because of the monopolistic nature of the business. No exception can be taken to high standards for the professional classes such as lawyers, physicians, dentists, nurses, and accountants, or "the so-called quasi-professional groups," including osteopaths, neuropaths, chiropodists, veterinarians, and midwives. The questionable regulations usually concern the ordinary trades such as those of barbering, cosmetology, plumbing, building, watchmaking, and photography, etc. "Such statutes may readily operate to restrict the number of persons who may engage in a particular occupation, and also lead, in some degree, to the control of competition and price. Whether this result is desirable or undesirable depends upon one's view with relation to our economic society."

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RESTATEMENT OF THE LAW: PROPERTY: Vol. III—Future Interests (continued and concluded). 1940. St. Paul: American Law Institute Publishers. pp. xliii, 1181-2118.

LEGAL REALISM AND JUSTICE, by Edwin N. Garland. 1941. New York: Columbia University Press. pp. lx, 161. Price $2.00.

FEDERAL PROCEDURAL FORMS: Civil and Criminal Actions, Bankruptcy Proceedings, Suits in the Court of Claims, Administrative Practice Before Important Boards and Commissions, and all Appeals pertaining thereto, by Alexander Holtzoff and Allen R. Crozier. 1940. Indianapolis: Bobbs-Merrill Company. pp. xxiii, 1010. Price $15.00.

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AMERICAN STATE DEBTS, by B. U. Ratchford. 1941. Durham: Duke University Press. Pp. xviii, 629. Price $5.00.

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A QUEST FOR INTERNATIONAL ORDER, by Jackson H. Ralston. 1941. Washington: John Byrne & Co. Pp. 205. Price $2.00.

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MASARYK'S DEMOCRACY, by W. Preston Warren. A Philosophy of Scientific and Moral Culture. 1941. Chapel Hill: The Univ. of North Carolina Press. Pp. x, 254. Price $2.50.

LAW WITHOUT FORCE: The Function of Politics in International Law, by Gerhart Niemeyer, 1941. Princeton: Princeton Univ. Press. Pp. xiv, 408. Price $3.75.

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THE PLANS FOR THE NEW RULES OF CRIMINAL PROCEDURE*

By JAMES J. ROBINSON[1]
Reporter for the Committee

THE statute by which Congress provided for rules of procedure prior to appeal in criminal cases in Federal courts became law on June 29, 1940. "This Act represents," says Wigmore, "the most notable forward step, for a century past—or more—in the rationalizing of criminal procedure in the United States." Chief Justice Hughes, recently retired, has shown in many ways his deep personal interest in the work of the Committee. Chief Justice Stone likewise has aided the Committee, and particularly the Reporter, in a very special way, by furnishing him his working quarters. Acknowledgment is due also for the great assistance which the Committee is receiving from the pioneering work of the Advisory Committee on Rules for Civil Procedure. Time and again we observe that the work of the Civil Rules Committee has prepared the way for the Committee on Criminal Rules.

Looking to activities in the future, I wish to describe the status and plans of the Criminal Rules Committee. I shall discuss (I) The Committee's legal background, (II) the Committee membership, its coordinating committees, and its headquarters, and (III) the Committee's plan of work.

(I) The Committee's Legal Background

The terms of the Act of June 29, 1940 (Public No. 675—76th Congress, c. 651, s 1, 48 stat. 1064, 28 USCA s 723a) are as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States, including the district courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and the Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, in the United States Court for China, and in proceedings before United States commissioners. Such rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session, and thereafter all laws in conflict therewith shall be of no further force and effect.

On February 3, 1941 the Supreme Court entered an order (312 U. S. 717, 85 L. ed. 495) the terms of which are as follows:

ORDER: It is ordered:

1. Pursuant to the Act of June 29, 1940 . . . the Court will undertake the preparation of rules of pleading, practice and procedure with respect to proceedings prior to and including verdict, or finding of guilty or not guilty, in criminal cases in district courts of the United States.

2. To assist the Court in this undertaking, the Court appoints the following Advisory Committee to serve without compensation. (See ABA JOURNAL, March, 1941, p. 182, for personnel of the Committee.)

3. It shall be the duty of the Advisory Committee, subject to the instructions of the Court, to prepare and submit to the Court a draft of rules as above described.

4. During the recess of the Court the Chief Justice is authorized to fill any vacancy in the Advisory Committee which may occur through failure to accept appointment, resignation, or otherwise.

5. The Advisory Committee shall at all times be directly responsible to the Court. The Committee shall not incur expense or make any financial commitments except upon the approval of the Court as certified by the Chief Justice or upon his order during a recess of the Court.

(II) The Committee's Membership, its Coordinating Committees, and its Headquarters

The 18 individual members of the Advisory Committee represent the District of Columbia and 11 states, extending from New York and Connecticut to California, and from Minnesota to New Mexico. They include lawyers, law teachers and law writers. Their professional experience includes services as judges, federal and state district attorneys, assistant attorneys general, defense counsel and lawyers in the general practice of law. The law teachers and law writers include an adviser in the drafting of the Code of Criminal Procedure of the American Law Institute, the editor of the authoritative American journal in the field of criminal law administration, and the joint author of a standard cyclopedia on federal procedure and practice.

It was the desire of the Chief Justice and of the Court that offices for the Advisory Committee, and particularly for the Reporter, be established in the Supreme Court building. This has been done, through the special assistance of Mr. Justice Stone, who placed at the service of the Reporter two rooms of his suite in the Supreme Court Building.

The staff in the Reporter's office now consists of 8 members, of whom 6 are engaged full time in the work of the Committee. One member has been provided through the kindness of the Attorney General from his staff. The Director of the Administrative Office of the United States Courts has provided the Committee with an assistant secretary and has aided it in making arrangements for working space and in recruiting its staff.

*This article is the ninth published in consecutive issues of the JOURNAL in advocacy of the program of the Special Committee on Improving the Administration of Justice. It is a part of an address at the Annual Judicial Conference for the Second Circuit, New York City, June 26, 1941.

1. Member of the Special Committee on Improving the Administration of Justice, American Bar Association; and Director of the Institute of Criminal Law Administration, Indiana University.

(III) The Committee's Plan of Work

The work of the Committee includes three types of activity. First, the existing law on each step in federal criminal procedure is carefully studied.

Second, recommendations as to changes, if any, in each procedural step are thoroughly considered. The sources of the recommendations are: (1) Federal Judges, in their reported opinions, in addresses and law journal articles, and in communications made directly to the Advisory Committee; (2) United States Attorneys; (3) Attorneys General of the United States, in their formal opinions and in their annual reports; (4) practicing lawyers, as individuals and as members of committees appointed by Federal Judges and by officers of Bar Associations; (5) the crime surveys, namely, the National (Wickersham) Commission on Law Observance and Enforcement (1931), and the survey of Cleveland (1922), of Missouri (1926), of California (1927 et seq.), of Minnesota (1927), of New York (1928 et seq.), of Illinois (1929), of Virginia (1931), and the Report of the Attorney General's Conference on Crime (1934); and, finally, (6) the provisions incorporated in the American Law Institute Code of Criminal Procedure (1931), in the New York Proposed Revision of the Code of Criminal Procedure (1939), and in the criminal procedure of the several states and of England.

The third type of the Committee's activity is the preparation of successive drafts of criminal rules.

The first full meeting of the Advisory Committee was held in the Supreme Court Building on February 21, 1941. The next meeting of the Committee will be held early in September. Subsequent meetings will be held more frequently as required to consider the recommendations from judges, lawyers, and other citizens and from organizations, and to consider successive drafts of proposed rules.

The first tentative draft of the Rules is now being prepared by the Reporter. It will serve as a basis for the deliberations of the Advisory Committee at its September meeting. Succeeding drafts will be prepared in the light of the criticisms and suggestions which will be received, at first from the Advisory Committee and later, when public distribution may be authorized by the Supreme Court, from both the Advisory Committee and also from the cooperating committees and from all other sources.

What will be the provisions of the final draft of the Rules of Criminal Procedure? There is of course no direct answer to that question at this time. The Committee is finding, however, that certain topics with which the proposed Rules may deal are especially prominent in the recommendations made to the Committee by judges and lawyers.

These procedural topics which are attracting special attention and the other procedural details, both existing and proposed, which require attention must be tested by the standards of legal principles which are established as fundamental law and which are demanded as individual rights in this country. These standards have come to be summarized by the expression "due process of law," although, strictly speaking, it is by clauses other than the due process clause of the Bill of Rights of the Federal Constitution that some of these fundamental rights have been established.

When a court of the United States is considering the question of whether or not a certain statute or rule or proceeding, whereby a person is deprived of life or liberty or property under color of the criminal law, meets the general test of conformity with the principle of due process of law, what specific test does the court apply to the statute or rule or proceeding in question? The general question—is it due process?—is seen to be reducible to one or more of five specific questions, depending upon what detail, or details, of criminal procedure is involved. The specific question in regard to a particular provision or case, therefore, may be one of the following questions. Is the notice an adequate notice? Is the hearing a fair hearing? Is the tribunal an impartial tribunal? Is the procedure an orderly procedure established by law? Is the judgment a conclusive judgment?

Each provision and step in criminal procedure, whether actual law or proposed rule can and should be tested by one or more of these five questions. If a question is answered in the negative, the proposed provision must be rejected from further consideration as a possible provision in a code of criminal rules. On the other hand, if a question is not answered in the negative, the proposal is in accord with due process of law (if consistent with the other, more specific guarantees of the Bill of Rights) it is entitled to consideration for inclusion in a code of rules of criminal procedure.

[*Here follows a discussion of certain proposals which have been suggested to the Committee and observations as to what question or questions may eventually be applied to each proposal as a test of its consistency with due process of law.*]

The Advisory Committee will join me, I am sure, in telling every judge and lawyer in this country that we want each of them to give the Committee their recommendations for any or all details of the proposed federal rules of criminal procedure. We are sincerely convinced that our success or failure as a committee will be determined by our ability to win the confidence and constant support of the Bench and Bar. The committee is not out to reform anything or anybody. It recognizes fully the exemplary work which is done by the federal courts in the administration of justice in this country. Members of the committee know firsthand by personal experience and observation the labors and the anxieties of the judge, of the prosecuting attorney, and of defense counsel in the every day work of the courts, both federal and state. I am sure that the Committee will not endorse any proposal the soundness of which is not established beyond a reasonable doubt by experience in the courts and by recommendations of judges and lawyers.

LONDON LETTER

IT IS difficult to know how or where to begin to give an account of the disaster which has overtaken the Inns of Court since the previous London Letter was written. It is nearly as difficult to exercise the restraint in describing it which should be observed even in dealing with the barbarity practiced by the Nazis, with which the World has become so familiar. If anything can be said to their credit it is perhaps that this time no "military objective" has been claimed by them. Previous damage sustained by the Inns of Court, serious though it has been, has been far surpassed by the most recent calamities.

The Temple Church

Perhaps one should place first on the list the tragedy of the Temple Church, which has been entirely gutted by fire. Not a single pew, nor even a charred splinter of wood remains in its interior. Every vestige of its furnishing has been completely destroyed by the raging inferno of flame which broke out as a result of showers of incendiary bombs dropped by the enemy on a night which was so bright that every detail of the City could be plainly seen. Where the organ stood is now an empty space, open to the air. The roof of the Round Church has fallen in, and the beautiful Purbeck marble pillars, which were an outstanding feature of the structure, have been cracked and broken by the intense heat. The recumbent figures of the Knights in the Round have been broken and burnt out of all recognition; one only, near the south side of the Church, having escaped destruction. The memorial tablets, high on the walls of the triforium, scarred and broken by the flames, can be seen from the court below. Standing in the Church on the following day, the air still warm and the floor covered with a fine white ash, my thoughts were a jumble of emotions beyond the power of expression. To one who has lived and worked in the Temple for many years, the loss of the Church is a tragedy greater than any which have befallen this sadly battered part of London. The walls are still standing, and it may be possible to repair and re-furnish it, but at the moment it looks to be in a very dangerous condition, and expert advice must be sought on the matter. Some little comfort may be had in the knowledge that the Communion Plate and the Registers have been saved, but the latter are in a very sad condition, having been thoroughly soaked with water, and much expert work will be necessary before they can again be used.

The Round Church was stated by Dugdale to have been built in the form of the Temple near unto the Holy Sepulchre at Jerusalem. It was erected by the Knights Templars and consecrated in the year 1185 by Heraclius, the Patriarch of Jerusalem, in the presence of Henry II and his magnates. The Choir, or oblong, was added in the year 1240. The organ which, as stated by Baylis in his book on the Temple Church, for its number of stops, pipes, sweetness, and brilliancy of tone has not been surpassed, was built in 1688 by Bernard Schmidt (Father Smith) a German who came over to England in the reign of Charles II. It cost the two Societies £1,000 in equal moieties. Many additions had been made to the organ from time to time and, prior to its destruction, it contained 70 stops and 3,719 pipes. Now not a particle of it remains.

The Master's House

This house, which was partly demolished in an earlier raid, has now been entirely destroyed. It may be remembered by members of the American Bar who have been in this country, as having stood at the north-east corner of the Church, with a garden in front stretching to Lanfield Court. The Templars were exempted by a Papal Bull from Episcopal jurisdiction, and this exemption has continued in the Temple to the present time, the Master taking his place in the Temple Church without induction, on the authority of Letters Patent granted by the Crown. The present Master is the Rev. Harold Anson, Hon. Canon of Southwark.

The Cloisters

The Cloisters, built in 1681 in accordance with plans prepared by Sir Christopher Wren, have also been destroyed by fire. Earlier Cloisters, only half the width of Wren's, were destroyed in the great fire of 1679, and an inscription commemorating that disaster and the erection of those now lost was to have been seen in three places as follows: "Vetustissma Templariorum Porticu Igne Consumpta An° 1679, Nova haec sumptibus Medii Templi extructa An° 1681 Gulielmo Whitelocke Arm° Thesaur°." If, after the war, it is desired to reconstruct the Cloisters as they were, the plans drawn by Wren are still in possession of the Middle Temple.

Lamb Building

Lamb Building is now nothing but a heap of burnt-out ruins. The few walls still remaining upright stand out as a stark monument to the fury of the fire which raged within. This building, of fine red brick, was thought by many to be the handsomest in the Temple. It was built in 1667, after the great fire of 1666.

Inner Temple Hall and Library

It has been noted in previous Letters that these two well-known buildings had already been seriously damaged in earlier raids. They have now been completely gutted by fire, which also destroyed the Inner Temple Treasury. Following the earlier damage referred to, the Librarian of the Inner Temple had been engaged in moving the more valuable books which had been salved to places less likely to be regarded as danger zones, and had prepared a place to be used by Members of the Inn as a temporary law library, which it was intended to open shortly. Now all his efforts in that direction have been

brought to naught, and many thousands of books have been destroyed.

Brick Court

The site of the two oldest buildings in Brick Court (Nos. 2 and 3) is now covered by a heap of burnt bricks, above which stands only the walls of the staircase of number 2. It was in this building that Oliver Goldsmith came to live in 1768, and where he died six years later. His tomb at the north side of the Temple Church is now partly buried under the ruins of the Master's House. In the chambers below Goldsmith, Blackstone wrote his famous "Commentaries."

Other Buildings Destroyed

Mitre Court Buildings, at the top of King's Bench Walk, which had already been partly demolished in an earlier raid, have been burnt out, as has No. 1 King's Bench Walk. Harcourt Buildings, extending from Crown Office Row to Temple Gardens on the east side of Middle Temple Lane have been completely gutted by fire, and were still smouldering several days after the disaster. On the opposite side of the Lane, and overlooking the Middle Temple Garden, No. 3 Plowden Buildings was also gutted, while No. 4 Temple Gardens was badly burnt on the top floor. A large part of Plowden Buildings fell into the garden two days later and only a few walls remain standing. The remainder of Crown Office Row, including Lamb's birthplace, has also been destroyed by fire. Number 2 Elm Court, which was the only building remaining more or less intact in that Court after previous raids, has now been burnt out and will have to be pulled down. The top floors of 4 Brick Court and 5 Essex Court have also been seriously damaged by fire.

Pump Court

The whole of the south side of Pump Court has been completely destroyed. All the floors have fallen in, and only some of the walls remain standing. It was in this Court that another great fire originated in the year 1679, when many barrels of beer were played on it in an endeavor to put out the flames, but it was only stopped by blowing up the houses with gunpowder.

The Middle Temple Library

This building, already badly battered, suffered some additional damage to its roof by fire, but the promptitude of that Society's fireman, with the assistance of the fire brigade, prevented the fire spreading to the entire building. Only a very few books were damaged by water. It is surprising that this Library did not suffer further damage as a second high explosive bomb caused a large crater in the garden only a few yards away, but it seems that the resultant blast went straight upwards and did not, as is often the case, spread outwards. The Library was closed for three days pending the removal of a delayed action bomb from the garden, but is now functioning, as before, in the Common Room of that Society.

The destruction of so many sets of Chambers in the Temple has been the cause of very serious loss, not only to the Inns, but also to many residents and members of the Bar. Articles of furniture, important papers and law books have been lost, some still remaining buried under tons of wreckage. Many barristers had, for the time being, no place in which to meet solicitors or to hold conferences, and, in order in some measure to lessen this difficulty, the main room of the Middle Temple Library, though not now exactly the acme of comfort, has been made as habitable as possible for use as a conference room.

Gray's Inn

The tale of disaster is not all told with the fate of the Temple. Unfortunately Gray's Inn has suffered as severely. The Hall, Chapel, Library and Treasury Office have been completely gutted by fire. Nothing remains standing of the Chapel but part of the walls. Every one of the 35,000 books in the Library has been destroyed. The pension room and other rooms reserved for the Benchers met a like fate.

The Hall

How much of the original Hall of Gray's Inn was incorporated in the building now destroyed it is impossible to say, but it was rebuilt or re-edified in the years 1556 to 1560. Though smaller than the Middle Temple Hall it bore many points of resemblance to it. It was, as many members of the American Bar will remember, a very beautiful Hall, and a particularly fine specimen of Tudor architecture, 75 feet in length, 35 in width and 47 in height. At the west end stood a magnificent oak screen which, together with some of the tables with which the Hall was furnished, was said to have been presented by Queen Elizabeth. The screen was recently taken down, with the intention of transferring it to a place where it might reasonably be expected to be safer than in London and, when it was realised that nothing could save the Hall, attention was turned to the task of moving the screen out of danger of the flames. This effort was, happily, successful and it is gratifying to report that it has now been safely housed, and can be re-assembled when the time comes to restore the Inns of Court. The oak panelling in the Hall was enriched by the armorial bearings of a long succession of Readers and Treasurers. Now nothing remains but an empty shell.

The Library

The earliest mention of a Library in Gray's Inn is to be found in the will of Robert Chaloner, of Stanley, who was Lent Reader in 1522. By this will, which was dated 7th July, 1555, Chaloner directed that all his law books were to be conveyed to his cousin, Robert Nowell, at Gray's Inn "and then xLs. in moneye to be delyvered unto the said Robert Nowell, to th'entent that he maie by cheines therwyth and fasten so manye of them in the Librarye at Grauisin as he shall think convenyente." Since then the Library had been situated in various places in the Inn, but in 1788 it was moved to what later became known as the North Library, overlooking Gray's Inn Square.

Temple S

WASHINGTON LETTER

THE need for a system to get a hearing more readily, in the rare case where a United States judge is guilty of conduct "other than good behavior," again has been brought to the attention of Congress by Chairman Hatton Sumners of the House Judiciary Committee. The bill, H. R. 146 of this, the 77th Congress, has been favorably reported by the Judiciary Committee. It does not differ in major respects from H. R. 9160 of the previous Congress, the 76th, the discussion of which, occurring on the floor of the House, was reported at length in the Washington Letter to the JOURNAL, issue of May, 1940, p. 383.

By the method provided in the bill, the question of "good behavior" might be raised only by a resolution of the House of Representatives based upon "reasonable ground for believing," etc., and directed to the Chief Justice of the United States who would designate a special term court of three circuit judges, indicating the judge to preside at the trial. If a circuit judge were being tried no judge from the same circuit could serve. The judge to be tried could challenge members of the special court for cause subject to the approval of the Chief Justice.

The proceeding would be a civil action in the name of the United States, under direction of the Attorney General, with the assistance, if he choose, of such members of the House as may be designated in the resolution; and the issue would be only the right of the judge to remain in office. The trial would be without a jury and would be governed by the rules of the Supreme Court.

Should the special term circuit court decide that the accused judge's conduct in question had been other than "good behavior," according to the constitutional meaning of that phrase, the judge's judicial authority then would cease, subject to that ruling being made final upon an appeal to the Supreme Court within thirty days, which appeal might be taken either by the United States or by the defendant. The judge's salary would continue until the end of said thirty-day period or until the determination of the appeal if one were taken. All federal judges except Justices of the Supreme Court would be subject to the provisions of the measure if enacted.

A clear explanation of the bill is given in the Committee's Report No. 921, which points out the difference between this plan and ouster by impeachment, the need for such an enactment, and the constitutional warrant for it. The report cites several approvals of the measure including the favorable resolution adopted at the September, 1940 annual meeting of the American Bar Association as reported in the JOURNAL for October, 1940, pp. 760-763; and quotes from an editorial in the JOURNAL for March, 1941, p. 163. It gives also an endorsement of the Chicago Bar Association closing with these words:

"The procedure under the bill furnishes a workable, effective, and dignified method for properly determining the issue of good behavior. Unless the method embodied in the present bill is adopted, the existence of occasional isolated improper uses of the Federal judicial power may well provoke a public reaction for sweeping control of the judiciary by other means."

De-Washingtonizing the Government

An opportunity to make a comprehensive study of the problem of transferring some of the government agencies from Washington was given the House through a resolution of Chairman Sabath of the Rules Committee. The resolution, H. Res. 257, was defeated in the House by a vote of 203 to 72 but, since it involves a subject which we may hear more of later, a brief look at the resolution is timely. It would have created an investigating committee of five members from the House of Representatives.

This committee would have been required to report from time to time during this Congress on the result of its investigations and also to make recommendations for legislation. The committee, as planned, would have studied the location, extent, and cost of office space and other facilities rented, both in and outside the District of Columbia, by the various departments, bureaus, and agencies.

Some of the non-defense agencies which it has been suggested might be moved out of Washington, and which shifts the Budget Bureau already has been studying, are that the Interstate Commerce Commission and the Railroad Retirement Board might go to Chicago; the Farm Credit Administration to St. Louis; a considerable part of the Social Security Board to Philadelphia or Baltimore; and the Securities and Exchange Commission to New York.

But, even before Congress had decided not to make its own study of the matter at this time, some of the administrative agencies had acted. Whether more shifts are anticipated, or if so how soon, it is impossible to say at any moment. Up to the present, the two agencies whose transfers have been ordered and now actually are in process are the Grazing Service of the Interior Department, to Salt Lake City, Utah; and the Home Owners Loan Corporation, to New York City.

No Foreign Proof of Invention

The date of an invention may not be established by acts done abroad after enactment of a bill by Representative Fritz G. Lanham, of Texas. This rule would apply both to proceedings in the Patent Office and in the federal courts and would cover pending patent applications; but it would not nullify any judicial finding of the validity of a patent made by a court of competent jurisdiction. The phrase "foreign country," as used in the bill, would not include any territory under control of the United States held under lease for military, naval, or national-defense purposes. The new rule would con-

stitute a new paragraph added to section 4886 of the Revised Statutes.

Subversives Indicted

The result of the Justice Department's heretofore quiet work in contravention of all subversive activities against national defense is beginning to come to the surface. One method used by conspirators is of interest as described in indictments returned by a St. Paul, Minnesota, grand jury against twenty-nine members and officers of the Socialist Workers Party, charging a conspiracy to overthrow the Government of the United States by force and violence and to incite members of the army and navy of the United States to rebellion.

The indictments, in two counts, alleged that the defendants, making use of the Socialist Workers Party, sought to bring about an armed revolution against the Government of the United States and solicited members for that purpose among workers and laborers throughout the country. In plotting their revolutionary movement, the indictment charged, the defendants took steps to:

1. Place SWP members in key positions in all major industries, particularly transportation, mining, lumbering, farming, shipping, and manufacturing, in order to seize control and paralyze American industry.

2. Place SWP members in key positions in trade unions in order to secure control and assure a complete stoppage of work throughout the country at a given time.

3. Incite dissatisfaction and rebellion among military and naval forces of the United States to impair their efficiency and morale and to provoke a revolt of enlisted personnel against their officers. (SWP members, the indictments charged, were urged to accept selective service training willingly but, after being inducted into the army, to incite disobedience and disloyalty "and when the appropriate time came to turn their weapons against their officers.")

4. Organize military units of workers and laborers, known as "Union Defense Guards," ostensibly to protect trade unions from violent attempts to destroy them but actually to lead the revolution against the Government of the United States.

5. Obtain explosives, firearms, ammunition, weapons, and military equipment for the revolutionary movement.

6. Follow, as the "ideal formula" for armed rebellion, the principles, teaching, writings, counsel, and advice of the leaders of the Russian Revolution of October, 1917, and particularly the revolutionary "textbooks" of Lenin and Trotsky.

7. Consult with Leon Trotsky, during his lifetime, in Mexico City to obtain his "advice, counsel, guidance, and directions" on carrying out the revolution.

The indictments, in count one, charged specifically that the defendants since July 18, 1938, have conspired to violate Section 6, Title 18, of the United States Code, relating to overthrow of the Government by force and violence. Count two charged that the defendants, since June 28, 1940, have conspired to violate Sections 9, 10, and 11, Title 18, of the Code, relating to interference with and impairment of the loyalty, morale, and discipline of the military and naval forces of the United States.

Both conspiracies, so the indictments charged, took place in St. Paul, Minneapolis, Chicago, New York and other cities, unnamed. The case is being handled by United States Attorney Victor E. Anderson and Special Assistant to the Attorney General Henry Schweinhaut, under the direction of Assistant Attorney General Wendell Berge.

State Rule to Control

The rights and liabilities of the persons concerned—in injury or death of any person by wrongful act or omission upon lands subject to the concurrent, partial, or exclusive jurisdiction of the United States and situated within the exterior boundaries of any state—would be the same as those applicable under the laws of the state, if the bill, H. R. 5235, is enacted. It was introduced by Chairman Sumners of the House Judiciary Committee.

In an action to recover damages, or under workmen's compensation or similar statutes, the laws of the state would apply in so far as not in conflict with the laws of the United States. The Act of February 1, 1928, 45 Stat. 54, making state law applicable in damage actions for death or injury occurring in national parks, or other places under the exclusive jurisdiction of the United States, would be repealed. The bill would not affect the rule established by the Act of June 25, 1936, 49 Stat. 1938, making state workmen's compensation laws applicable to federal projects within the several states.

Eliminate Politics from Judiciary

[*From* The Daily Reporter, *lawyer's newspaper, in Milwaukee. Ed.*]

Chicago, Ill., June 11, 1941—Efforts to establish a system of electing judges, which would eliminate political campaigning by the judiciary, are being made by the Committee on Judicial Selection and Tenure of the American Bar Association, headed by John Perry Wood of Los Angeles, California.

Support of the plan is being sought from state and larger local bar associations in those states which still have popular elections for judges. The committee will outline the results of its work at the annual meeting of the Association, September 29 to October 3 in Indianapolis.

"In the smaller communities where the membership of the bar is known to the people, direct election of judges works with fair satisfaction," Judge Wood said. "In the more populous areas, however, with numerous judicial offices to be filled and usually a flock of candidates for each office, it has become practically impossible for the electorate to secure information adequate to intelligent voting.

"The plan proposed by the Association provides for a nominating commission, composed of outstanding citizens, none of whom is an officeholder."

CURRENT EVENTS

Small Loan Acts

THE JOURNAL is in receipt of a pamphlet report of the "Conference on Personal Finance Law" of which Edmund Ruffin Beckwith, of the New York Bar (Chairman of the American Bar Association's Committee on National Defense) and Reginal Heber Smith (of the JOURNAL's Board of Editors) are members, and Professors Samuel Williston and Eldon R. James of Harvard Law School are the "Advisors." The report discusses the present status of "Small Loan Acts" and says among other things:

> "In 1916 the first draft of the Uniform Small Loan Law was published by the Russell Sage Foundation. • • • At the end of 1937, licensees under Small Loan Acts had outstanding loans of $360,403,000 to 3,276,000 borrowers."

A table showing the "Legislative History of Small Loan Law" as of May 1, 1940, is given which shows that there are now Small Loan Acts in 30 of the 48 states.

Law Firms and Wage Hour Law

SUPPLEMENTARY to what was said in this column in the July issue the JOURNAL points out that Interpretative Bulletin No. 6 of the Fair Labor Standards Act deals only with the question of whether or not law firms, banks, and others were entitled to exemption under Section 13(a)(2) of the act, as "service establishments." The bulletin did not rule on the applicability of that act to law firms.

In paragraph 43 of that Bulletin, it is specifically stated:

> As pointed out in paragraph 4, the fact that no exemption is available under Section 13(a)(2) does not mean that the wage and hour provisions of the Act necessarily apply. It is first necessary to determine that the employee is engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of Sections 6 and 7.

Judicial Council of Michigan

The JOURNAL has had occasion in the past to comment favorably on the work of the Judicial Council of Michigan (A.B.A. J., July, 1940, p. 622). The Michigan Judicial Council was established in 1929, the original act being amended in 1941 (Act 85, Michigan Public Acts of 1941). The 11th Annual Report of the Michigan Judicial Council issued in June, 1941, contains the judicial statistics for the state for the year 1940. One of the interesting facts disclosed is that in that state there has been a considerable decrease in the total number of original suits filed during the last nine years. The figures as given by the Report show the following totals for all cases commencing during each year, 1932 to 1940 inclusive: 1932 total cases 37,538; 1933 total cases 33,218; 1934 total cases 35,838; 1935 total cases 39,429; 1936 total cases 37,054; 1937 total cases 38,445; 1938 total cases 33,738; 1939 total cases 34,899; 1940 total cases 33,621.

There has been a similar decrease in the business of the Supreme Court of Michigan. A table is printed showing the number of opinions written for each year from 1915 to 1940 inclusive. The number of opinions written in 1915 was 561. The figures for the last ten years are: 1931, 547 opinions; 1932, 676 opinions; 1933, 613 opinions; 1934, 484 opinions; 1935, 431 opinions; 1936, 517 opinions; 1937, 480 opinions; 1938, 388 opinions; 1939, 427 opinions; 1940, 408 opinions.

It would be a good thing if the country at large had similar statistics to those so carefully kept in Michigan. If the trend of litigation in other states is the same as that in Michigan, it would indicate that the "curve" in Bulk of Reported Decisions has turned downward in this country. The comment in the item in the JOURNAL cited above suggests that is the fact. It is there pointed out that:

> The total annual output of reported decisions, for example, has "leveled off" since about 1920. In the years since that time the gross number of reported decisions in the entire Reporter System has averaged about 20,000 cases each year, and this in spite of the fact that the population of the country has substantially increased in those two decades and the total amount of business in the nation has probably more than doubled. There is solid ground for future optimism in these facts.

Improvement of Law Book Advertising

The JOURNAL has received from the A.B.A. Committee on Unauthorized Practice of Law a copy of an Order and Stipulation entered before the Federal Trade Commission concerning advertising by a particular law publisher which is of general interest to the bar. The Order and Stipulation concerned an "Agreement to Cease and Desist" on behalf of a certain publisher and concerned a booklet entitled "Your Will and How to Write It," which was being published and sold by that concern. In commenting on the "Cease and Desist Order," Mr. Edwin M. Otterbourg, Chairman of the above-mentioned committee, says:

> The bar will be interested in reading the enclosed "Stipulation as to Facts and Agreement to Cease and Desist" in respect to advertising of a booklet "Your Will and How to Write It." This matter of fooling the general public as to the use of so-called popular law books and getting them to buy and use them to their own disadvantage has been one of concern to the bar for many years. We have all been searching for some remedy. The bar cannot very well act as censor, nor are misrepresentations of the kind contained in certain advertisements "unauthorized practice of the law."
>
> Back in 1937 in a book review for the United States Law Review, I pointed out that if it is unlawful to advertise a patent medicine . . ., and if the use of the mails may be denied to literature making such claims, it would seem that the public should be likewise protected against legal misinformation or grossly exaggerated claims about what a book will do for its readers.
>
> I am quite sure the action of the Federal Trade Commission as above indicated is a completely new and novel precedent and points a way to a remedy.

BAR ASSOCIATION NEWS

Iowa State Bar Association

OVER eight hundred lawyers attended, on June 13 and 14 at Cedar Rapids, the largest annual meeting in the Iowa State Bar Association's history. The meeting opened Thursday evening with an informal

William A. Smith
President
Iowa State Bar Association

gridiron dinner. President George C. Murray presided at the business sessions of the meeting and devoted his presidential address to the Association's program of practical service for Iowa lawyers.

A feature of the meeting was an estate planning clinic conducted by Frederick L. Pearce of Washington, D. C. Convention speakers included Judge Merrill E. Otis who spoke on the topic "Citizenship in a Democracy: Seen From the Bench of a Trial Judge" and Virgil M. Hancher, President of the State University of Iowa, who addressed the lawyers on the subject of "Law and Tradition." The annual banquet was addressed by David Horton Elton, K. C. of Lethbridge, Canada, on the subject "History Repeats Itself."

Sessions of the Iowa Junior Bar Section were held concurrently with those of the senior session. New officers of the Junior Bar are: Ray Nyemaster, Jr., president; R. R. Buckmaster, vice president; and Dudley Weible, secretary.

Officers elected for the year 1941-42 are: W. A. Smith, president, Dubuque, E. W. McManus, vice president, Keokuk; Paul B. De Witt, secretary-treasurer, Des Moines; and B. B. Druker, librarian, Des Moines.

PAUL B. DE WITT
Secretary

Bar Association of the District of Columbia

THE annual meeting of the Bar Association of the District of Columbia was held June 10. The retiring president was Francis W. Hill, Jr. The incoming president is E. Barrett Prettyman. Mr. Prettyman is also Chairman of the Committee on Federal Income Tax of the American Bar Association Section on Taxation. On assuming his post as president, Mr. Prettyman made a "statement" about the purposes and function of bar association work which is worth repeating. He said:

> "Let me try to state the function of the Association as I see it. There are, of course, the social features, highly necessary; the maintenance of our ethical standards; the care of our library, and certain routine duties. But there are deeper and still more important obligations upon the organized bar throughout our country.
>
> "The concept of Law as the Administrator of Human Affairs has always faced two great problems. One is inefficiency, partly procedural and partly personal, in part inherent in the nature of things and in part curable. The other is the application of law to the poor. To succeed in the great idea to which our profession is dedicated, these two problems must someday be solved. Of course, there is no sudden answer. A panacea specific will never be devised. But lawyers as a group, the organized bar, bear the chief responsibility of trying to work the puzzle out. Piece by piece, generation by generation, we can, as a race, finally succeed. Every individual lawyer is under obligation to contribute his bit, however small it be, to the achievement of that end.
>
> "In addition, the bar of our immediate day faces a worldwide threat to the basic concept of government by law. Upon no other profession rests so squarely the duty to fight whole-heartedly, even financially, to maintain that precious principle. To this end we must make available to the authorities of defense every needed asset over which we have control or influence."

E. Barrett Prettyman
President
Bar Association of the District of Columbia

Wisconsin Bar Association

THE 63rd annual convention of the State Bar Association of Wisconsin was held at Green Lake, Wisconsin, June 26 to 28. The meeting was presided over by President William Doll of the Milwaukee bar, who delivered a stimulating address on the place of the lawyer in national affairs under the present emergency. One of the chief features of the meeting was an address by Hon. Merrill E. Otis, Judge of the United States District Court, Kansas City, Mo., on "Citizenship in a Democracy Seen

from the Bench of the Trial Judge."

A novel feature of the meeting was a panel symposium on the subject "What Can We Do?" being a discussion of "the part to be taken by lawyers and their families in building citizenship and in training for leadership." The program of the symposium was worked out by Mr. Carl B. Rix of the Milwaukee bar, a member of the A.B.A. Board of Governors. The program consisted of a "panel discussion" of several selected topics on which papers were read by qualified experts and after each paper the panel discussion took place. The panel consisted of Hon. F. Ryan Duffy, Judge of the Wisconsin District Court for the District of Milwaukee; Hon. Frank W. Bucklin, a leading member of the Wisconsin state bench; Hon. Warren Knowles, a member of the Wisconsin State Senate; Miss Catherine Cleary; and Mr. Urban A. Lavery, Managing Editor of the American Bar Association Journal. The Moderator for the symposium was Mr. Claire B. Bird.

The meeting closed with a banquet at which the principal speaker was President Jacob M. Lashly who spoke on "The American Bar Association—Its Opportunity."

The new president for the year 1941-42 is Walter W. Hammond of Kenosha.

Gilson G. Glasier is Secretary-Treasurer.

Massachusetts Bar Association

The annual meeting of the Massachusetts Bar Association was held June 6, 1941. One of the important matters coming before the meeting was the Report of Referendum on the Integrated Bar. The Referendum was submitted to 9,481 lawyers in the state. Of these 2,911 returned replies. The vote in favor of the integrated bar was 1,920; the vote not in favor was 991. It is interesting to note that of those who voted in favor, 1,317 replied that they belonged to bar associations, while 603 either did not belong or listed no bar association connection. Of those who answered not in favor, 654 belonged to bar associations and 337 either did not belong or listed no bar association connection.

Mayo A. Shattuck
President
Massachusetts Bar Association

The president for the year 1941-42 is Mayo A. Shattuck of Hingham. In his remarks when he was inducted into office at the annual meeting, he said among other things:

> "Good lawyers always respond to the challenge of hard work and their teamwork is notable, once they are convinced that a job needs doing. Voluntary committee work is the key to a strong association. Our members must expect, therefore, to be called upon for special committee assignments. These committees will be small and will be chosen with an eye to geographical proximity. Their reports will be circulated among our members and I hope through the memberships of our affiliated local associations. When our annual meetings take place, hereafter, we shall hope for enlightened round-table discussions on matters of significance to the profession and to the Commonwealth."

Lloyd D. Heth
President
Chicago Bar Association

FRANK A. GRINNELL
Secretary

Awards of Merit to Bar Associations

The House of Delegates of the American Bar Association has authorized the A.B.A. Section on Bar Association Activities to announce the 1941 competition for the Award of Merit to 1) the state bar association performing the most outstanding and constructive work during the year, and 2) the local bar association entitled to the same honor. The Awards of Merit will be made at the Annual Meeting of the American Bar Association in Indianapolis, September 29 to October 3. All state bar associations and all local bar associations in any state are eligible for this competition. Bar associations wishing to have their year's work considered in the making of these awards should write to the Secretary of the A.B.A. Section on Bar Organization Activities, William B. Carssow, Littlefield Building, Austin, Texas. Applications must be promptly submitted, to receive consideration.

Women Lawyers' Journal

The "Convention Number" of the Women Lawyers' Journal (July, 1941) which is published by the National Association of Women Lawyers is at hand. It contains, among other things, the program for the Annual Convention, to be held at Indianapolis, September 26 to 29—just prior to the meeting of the American Bar Association. The President of the Women's Association is Florence K. Thocker, of the Indianapolis Bar. She is a member of the American Bar Association. The Managing Editor of the Women Lawyers' Journal is Jean Smith Evans, of Chicago. Among the listed speakers at the convention is Hon. Florence Allen, Judge U. S. Circuit Court of Appeals Sixth Circuit, and Hon. Genevieve Cline, of the United States Customs Court.

JUNIOR BAR NOTES

By JAMES P. ECONOMOS

Secretary, Junior Bar Conference

James K. Northam, Indiana State Director of Public Information, and Julius Birge, Indiana State Chairman. Broadcast on the part the Junior Bar Conference is playing in "Civilian Defense," a regular weekly broadcast.

A SINCERE effort is being undertaken this summer by many state and local directors of the Public Information Program to continue their radio and speaking campaigns on behalf of National Defense and the preservation of the American form of Government. Reports now being received by National Director Paul F. Hannah, Washington, D. C., indicate an increase in the use of radio facilities over previous years. Regular weekly broadcasts are in progress in at least twenty cities with many new programs projected for the fall.

Two radio scripts entitled "Mass Production" and "Defense Contract Service" furnished to the directors by OPM have been given many local presentations throughout the country.

The Executive Council of the Conference has authorized the National Director to offer the services of the Public Information Program to the Office of Civilian Defense. Plans for effective assistance are being formulated. In the meantime, directors in the states of Florida, Illinois, Massachusetts, New Jersey and Wisconsin are co-operating with the State Defense Councils in the aluminum collection drive and other activities.

The officers have been busy filling requests to appear before various junior bar groups. Chairman Lewis F. Powell, Jr., Richmond, Va., recently discussed the Soldiers' and Sailors' Civil Relief Act at the annual meeting of the Virginia Integrated State Bar. Past Chairman and National Director Hannah traveled to Bedford Springs, Pa., to deliver an informative address on the Public Information Program to the Junior Section of the Pennsylvania State Bar Association.

Vice Chairman Philip H. Lewis of Topeka, Kansas, was the guest of the Junior Bar Section of the Iowa State Bar Association in convention at Cedar Rapids. Richard Plock, Burlington, Retiring Chairman, was highly recommended for the office of Iowa State Chairman of the Conference.

Council member Willett N. Gorham and Secretary Economos, both of Chicago, attended a meeting of the local directors held at Lawsonia, Green Lake, in conjunction with the Wisconsin State Bar annual meeting. Jack N. Eisendrath, Milwaukee, State Director, presided.

Philip H. Lewis, Vice-Chairman and Chairman of the Committee on Co-operation with Junior Bar Groups announces the issuance of the Junior Bar News Bulletin. It has collected news of the activities of many state and local junior bar organizations and is using this means of disseminating this information to the officers of these groups. A detailed explanation of the Conference activities is also contained therein. Anyone interested in obtaining a copy may do so by writing to the Secretary.

Harold W. Schweitzer, Los Angeles, Council member from the Ninth Circuit, has been called for active military service with the Judge Advocate General's Office in Washington, D.C. State Chairmen John K. Cunningham, of Washington, D.C., Richard C. Cadwallader, Baton Rouge, La., and Alfred H. Joslin, Providence, R. I., have also been called for military service. Charles K. Woltz, Richmond, Va., a member of the National Committee on Restatement of Law, has been inducted.

John Oliver, Kansas City, Missouri, Council member for the Eighth Circuit, reports that the Missouri State Bar Association approved the formation of a State Junior Bar Section and appropriated sufficient funds for its operation during the current year.

A Special Committee on Junior Bar Co-operation has been appointed by the Nebraska State Bar Association. John M. Gepson, of Omaha, was selected as Chairman.

Joseph Pennington Straus, Pennsylvania State Chairman, instituted a radio series consisting of eleven programs presented over Station KYW at 10:30 P.M. every Monday evening. Nationally prominent persons spoke on behalf of Civilian Defense.

New officers of the Section on Younger Members Activities of the Illinois State Bar Association are: Robert C. McClory, Chicago, Chairman; Harper Andrews, Kewanee, Vice-Chairman; and Adolph Allen Rubinson, Chicago, Secretary.

At the Fourth Annual Meeting of the Kansas Junior Bar Conference held in Topeka, Harry T. Coffman, Lyndon, and William Tinker, Wichita, were elected Vice-Chairman and Secretary respectively. The Conference unanimously endorsed the nomination of Verne M. Laing of Wichita for Chairman.

NOMINATIONS FOR EXECUTIVE COUNCIL

Attention of Members of Junior Bar Conference Residing in the First, Second, Third, Fourth, Fifth, and Sixth Federal Judicial Circuits:

Pursuant to Section 4B of Article IV of the By-Laws, you are hereby notified that the members of the Junior Bar Conference residing in the First, Second, Third, Fourth, Fifth, and Sixth Federal Judicial Circuits (hereinafter referred to as Council Districts) may nominate candidates for the office of member of the Council from each of said Council Districts by written petition specifying the office for which nominated and containing the names of at least twenty endorsers, all of whom are residents of the respective judicial circuits. The petition can state briefly a biographical sketch of the background and qualifications of the candidate. It shall be submitted to the Chairman, Lewis F. Powell, Jr., Electric Building, Richmond, Virginia, not later than September 15, 1941. At the first session of the annual meeting, the Chairman of the Conference shall deliver to the Chairman of the Nominating Committee all petitions submitted pursuant to these provisions.

The Nominating Committee shall consider the candidates proposed by each of said petitions, as well as receive names of other candidates and report its council nominees at the same time and place, and in the same manner that it reports the nominations for the officers of the Conference. Other nominations for the Council may be made from the floor following a report of the Nominating Committee. The election of Council members shall take place at the same time and place, and in the same manner as the election of officers.

TERM OF OFFICE: The term of office of the Council members elected at the Indianapolis Annual Meeting shall begin with the adjournment at the close of the annual meeting at which elected and ending with the adjournment at the close of the second succeeding annual meeting next following the election, and until their respective successors shall be elected and qualify.

ELIGIBILITY: The person nominated shall be a resident of the Circuit for which he is nominated and provided that during his term of office, he shall not become ineligible for membership in the Conference. The membership of a member of the Conference shall terminate at the conclusion of the calendar year in which the member attains the age of thirty-six years, or upon his ceasing, prior to that time, to be a member of the American Bar Association. No person shall be eligible for election as a member of the Executive Council if he is a member of the Council and has been such member for a period of three years or more.

JAMES P. ECONOMOS, Secretary
Junior Bar Conference of the
American Bar Association

PROPOSED AMENDMENTS

to the Constitution and By-Laws of the American Bar Association

To be Presented and Acted Upon at Its Sixty-fourth Annual Meeting at Indianapolis, September 29 to October 3

TO THE MEMBERS OF THE AMERICAN BAR ASSOCIATION AND OF THE HOUSE OF DELEGATES:

I

NOTICE IS HEREBY GIVEN that Chauncey E. Wheeler of Providence, R.I., Walter P. Armstrong of Memphis, Tenn., George H. Bond of Syracuse, N. Y., Guy Richards Crump of Los Angeles, Calif., and George Maurice Morris of Washington, D. C., members of the Association and members of the Rules and Calendar Committee of the House of Delegates, have filed with the Secretary of the Association the following amendments to the Constitution and By-Laws of the Association and the Rules of Procedure of the House of Delegates:

1. Amend Article V, Section 5, of the Constitution, by inserting in line 12 thereof after the comma following the word "petition" the following: *"not exceeding a total of fifty names,"* so that the second sentence of said Section, as amended, shall read as follows:

"The Board of Elections shall thereupon cause each nomination, and the names of the signers of such petition, not exceeding a total of fifty names, to be published in the next issue of the American Bar Association Journal."

2. Amend Article V, Section 5, of the Constitution by adding at the end thereof the following:

"Notwithstanding the foregoing provisions, and in the event of any vacancy in the office of State Delegate occasioned otherwise than by failure of the State Delegate to register on the opening day of the annual meeting as aforesaid, until a successor shall be elected as aforesaid, the vacancy shall be filled by a person chosen by the President of the Association, the member of the Board of Governors from the judicial circuit in which the vacancy exists and the remaining members of the House of Delegates from the State in which the vacancy exists, in such manner as shall be determined by the Chairman of the House of Delegates. Said Chairman, immediately upon learning of the existence of any such vacancy, shall be charged with the duty of carrying this provision into effect."

3. Amend Article VI, Section 1, of the Constitution by striking out, in lines 8 to 11 thereof, the sentence reading:

"If the office of an elective member of the Board of Governors shall become vacant, such office shall be filled for the unexpired term, by election as herein provided."

and inserting in lieu thereof the following:

"If the office of an elective member of the Board of Governors shall become vacant, such office shall be filled for the unexpired term, by election, as herein provided, and until such election shall be held and a successor shall have been qualified, such vacancy shall be filled by a person chosen by the President of the Association and the members of the House of Delegates from the judicial circuit in which the vacancy exists, in such manner as shall be determined by the Chairman of the House of Delegates. Said Chairman, immediately upon learning of the existence of any such vacancy, shall be charged with the duty of carrying this provision into effect."

4. Amend Article XII of the By-Laws by adding thereto a new section to read as follows:

"SECTION 6. Reports of Sections.

"All Sections shall have their reports printed, or otherwise duplicated, and distributed to members of the House of Delegates (unless otherwise ordered by the House) before action thereon is taken by the House of Delegates. Whenever legislation is proposed, reports containing recommendations for action by the House of Delegates, shall be accompanied by a draft of a bill embodying the views of the Section. All Section recommendations shall be accompanied by a statement of the reasons therefor. Recommendations of a Section or of the National Conference of Commissioners on Uniform State Laws may be acted upon at any meeting of the House of Delegates immediately following or held contemporaneously with a meeting of the Section or Conference."

5. Amend Article X, Section 20, of the By-Laws by substituting a period for the semicolon after the word "submitted" in the 13th line, and striking out the balance of said section.

6. Amend Rule VII, paragraph 2, of the Rules of Procedure of the House of Delegates by adding at the end thereof the following:

"When a minority report has been filed in connection with a Committee or Section report, one representative of the minority, selected by the minority for that purpose, shall have the privileges of the floor, without vote, to speak once, not to exceed ten minutes, upon the question."

7. Amend Rule VII, paragraph 3, of the Rules of Procedure of the House of Delegates by inserting in line 7 thereof after the word "Committees" the following:

"or persons presenting minority reports of Committees or Sections"

so that the last sentence of said paragraph, as amended, shall read as follows:

"No non-member of the House (except Chairmen of Association Committees or persons presenting minority reports of Committees or Sections) shall be heard by the House, unless upon motion of a member and the unanimous vote of the House."

II

NOTICE IS HEREBY GIVEN that Howard L. Barkdull of Cleveland, Ohio, Harold J. Gallagher of New York City, Morris B. Mitchell, of Minneapolis, Minn., Wm. O. Reeder, of St. Louis, Mo., and Floyd E. Thompson of Chicago, Ill., members of the Association, have filed with the Secretary of the Association the following amendments to the By-Laws of the Association:

1. Amend Article I, Section 3, of the By-Laws by striking therefrom the words *"Any person eligible for membership in the Association and elected as above provided, and"* and the words *"heretofore elected,"* and by adding after the words "any member of the Association" the words *"who shall have paid regular dues for a period of twenty-five years"*; and by striking the figures *"$100"* and inserting in lieu thereof the figures *"$125"*; so that said Section 3 shall read as follows:

"Section 3. Life Membership.—Any member of the Association who shall have paid regular dues for a period of twenty-five years, may become a life member of the Association upon written notice to the Treasurer and payment of the sum of $125 for such life membership. Such payment when made shall be in full of all dues to the Association during the life of such member. A life member shall have all the privileges of an active member of the Association. All sums paid for life membership in the Association shall be invested by the Treasurer; and the income therefrom shall be used for the general purposes of the Association, unless otherwise provided by further amendment hereof."

2. Amend Article I of the By-Laws by adding thereto a new section to be known as Section 4, which shall read as follows:

"Section 4. Sustaining Membership.—Any person eligible for membership in the Association and elected as above provided, and any member of the Association heretofore elected, may become a sustaining member of the Association upon written notice to the Treasurer and payment of the sum of $25 dues for each year from July first to June thirtieth following, payable on July first of each year in advance, which sum shall include the regular Association dues and the individual subscription of the member to the AMERICAN BAR ASSOCIATION JOURNAL, *which is $1.50 per year. Any sustaining member may become a regular*

member of the Association upon written notice to the Treasurer before July first of any year, and shall thereafter pay only the regular dues as provided by Article II, Section 1."

3. Amend Article I of the By-Laws by changing the numbers of Sections 4 and 5 to Sections 5 and 6, respectively.

4. Amend Article II, Section 1, of the By-Laws by striking therefrom the figure *"$8.00"* and the figure *"$4.00"* and inserting in lieu thereof the figure *"$10.00"* and the figure *"$5.00"*; and by inserting at the beginning of the Section the words "Beginning July 1, 1942"; so that said Section 1 shall read as follows:

"Section 1. Scale of Dues.—Beginning July 1, 1942, each member shall pay Association dues of $10.00 for each year from July first to June thirtieth following, payable on July first of each year in advance, which sum shall include the individual subscription of the member to the AMERICAN BAR ASSOCIATION JOURNAL, *which is $1.50 per year; provided, however, that during the first five years after his original admission to the Bar, the Association dues of a member shall be $5.00 per year."*

5. Amend Article II, Section 4, of the By-Laws by striking out the word *"Honorary"* and inserting in lieu thereof the word *"Special"* in the title, and by adding after the word "honorary" in the text the words *"life and sustaining,"* so that said Section 4 shall read as follows:

"Section 4. Special Members.—This Article shall not apply to honorary, life and sustaining members of the Association or to members who have been placed on the special list pursuant to Section 5 of Article I of the By-Laws."

6. Amend Article II of the By-Laws by repealing Section 9 thereof.

HARRY S. KNIGHT,
Secretary.

Comment on Proposed Amendments

THE undersigned members of the American Bar Association, who are the members of the Committee on Ways and Means, have filed with the Secretary of the Association six proposed amendments to the Association By-Laws, which are set forth above. These amendments are proposed in an attempt to solve the problem of meeting the increased expenses of the Association.

The enlarged scope of Association activities and the increased interest on the part of members has required the creation and maintenance of new sections and committees. Likewise the special demands on the organized bar brought about by changing conditions and the national emergency have increased the expenses of operation. For the past four years additional funds for these extraordinary expenses have been provided by selling sustaining memberships to a few hundred of our 30,000 members. During the present year more reliance has been placed on the sustaining membership campaign than ever before. At the present writing the campaign for 1000 sustaining memberships is being carried on, but it is meeting with some resistance from a variety of causes. It is obvious that the activities of the Association must be curtailed or there must be some permanent method provided for increasing the income of the Association.

The undersigned have proposed amendments to the By-Laws which will increase the regular dues from $8 to $10 and $4 to $5 a year and which place limitations on life memberships to bring them into line with the regular dues. We also recommend the creation of sustaining memberships which will be available to such members as feel they can afford to make an extra annual contribution to the income of the Association. This small increase in the dues will make it unnecessary to solicit special contributions to meet the regular demands of the budget and will distribute the cost of maintaining the Association among all the members without burdening any of them.

The immediate demand for additional funds arises out of the war emergency. Many of our members are being called into military establishments and their dues are being waived. This decreases the income of the Association. The Committee on National Defense is rendering a service that is reflecting great credit on the organized bar. It must maintain offices and a staff in the National Capital and must organize and contact local committees throughout the Nation in order to render the service required in the National interest. This increases the expenses of the Association. Added to this are the expenses of the Special Committee on Improving the Administration of Justice and other special committees made necessary by the rapidly changing world in which we live.

The American Bar Association is meeting its responsibility to the public, and the undersigned believe that every member wants to do his full share in supporting the Association in this important work. This can be done only by an increase in the scale of dues.

HOWARD L. BARKDULL
HAROLD J. GALLAGHER
MORRIS B. MITCHELL
WM. O. REEDER
FLOYD E. THOMPSON

TENTATIVE PROGRAM

64th ANNUAL MEETING OF THE

AMERICAN BAR ASSOCIATION

September 29 to October 3, 1941

THE ASSEMBLY

Monday, September 29, 1941. 10:00 A.M.

FIRST SESSION

Call to Order

Address of welcome, by Mr. Albert Harvey Cole, Indiana

Response to welcome by Honorable Forrest C. Donnell, the Governor of Missouri

Annual Address of the President of the Association

Statement concerning work of the American Law Institute, by Honorable George Wharton Pepper, President of the Institute

Opportunity for offering of resolutions, pursuant to Article IV, Section 2 of the Constitution

Announcement by the Secretary of vacancies, if any, in the offices of State Delegates and Assembly Delegates

Nomination and election of Assembly Delegates to fill vacancies

Nomination of four Assembly Delegates for two-year term ending with adjournment of 1943 Annual Meeting*

Wednesday, October 1, 1941. 9:30 A.M.

SECOND SESSION

Election (by ballot) of four Assembly Delegates for two-year term ending at the close of the 1943 Annual Meeting.*

SYMPOSIUM ON HEMISPHERIC SOLIDARITY

Under auspices of the Section of International and Comparative Law

JOHN T. VANCE, Chairman, Presiding

Address by Dr. Enrique Gil, vice-president of the Bar Association of Buenos Aires, Argentine and Vice-President of the Inter-American Bar Association

Other speakers to be announced

8:30 P.M.

THIRD SESSION

Address by Sir Norman Birkett, K. C., of the English Bar.

10:00 P.M.

Reception by the President of the Association to members and guests. Dancing. Refreshment.

Thursday, October 2, 1941. 9:30 A.M.

FOURTH SESSION

Presentation of award of merit to a state bar association and a local bar association.

Presentation of prize award for 1941 Ross Bequest Essay to Willard Bunce Cowles, of Washington, D. C.

Open Forum—Report of Resolutions Committee, Hatton W. Sumners, Chairman.

Report by Chairman of the House of Delegates (or the Secretary) as to matters requiring action by the Assembly

Amendments of Constitution and By-Laws

7:30 P.M.

ANNUAL DINNER

THE PRESIDENT, presiding

Presentation of the American Bar Association Medal. Speakers to be announced later.

Friday, October 3, 1941. 12:30 P.M.

Luncheon

Presentation of incoming officers

Remarks by the incoming President

(following luncheon)

FIFTH SESSION

Report by the Chairman of the House of Delegates of the action of the House upon resolutions previously adopted by the Assembly

Action by the Assembly upon any resolutions previously adopted by the Assembly but disapproved or modified by the House

Unfinished business

New business

Adjournment

THE HOUSE OF DELEGATES

Monday, September 29, 1941. 2:00 P.M.

FIRST SESSION

THE PRESIDENT, presiding

Roll Call

Report of Committee on Credentials and Admissions, Morris B. Mitchell, Chairman, Minnesota

Approval of the Record

Statement of the Chairman of the House of Delegates

Report of the Treasurer, John H. Voorhees, South Dakota

Report of the Board of Governors to the House of Delegates, Harry S. Knight, Secretary, Pennsylvania

Report of the Committee on Rules and Calendar (including proposed amendments to Constitution and By-Laws) Chauncey E. Wheeler, Chairman, Rhode Island

Election of Members of the Board of Governors, as prescribed by the Constitution, Article VIII, Section 3

Offering of resolutions for reference to the Committee on Draft

*Note: At the midyear meeting of the House of Delegates held in Chicago March 17, 1941, the Committee on Rules and Calendar recommended that the election of Assembly Delegates for the regular term be scheduled for a session subsequent to that at which nominations are made.

Reports of Committees

Admiralty and Maritime Law, Cody Fowler, Chairman, Florida

Aeronautical Law, Mabel Walker Willebrandt, Chairman, Washington, D. C.

(a) Joint report with Committee on Admiralty and Maritime Law and Section of International and Comparative Law relative to Aviation Salvage at Sea

(b) Joint report with Section of International and Comparative Law Relative to organization of a permanent American Aeronautical Commission

National Defense, Edmund Ruffin Beckwith, Chairman, New York

Advancement and Coordination of National Defense, Thomas D. Thacher, Chairman, New York

Improving the Administration of Justice, John J. Parker, Chairman, North Carolina

American Citizenship, Joseph P. Gaffney, Chairman, Pennsylvania

Bill of Rights, George I. Haight, Chairman, Illinois

Ways and Means, Howard L. Barkdull, Chairman, Ohio

Jurisprudence and Law Reform, Walter P. Armstrong, Chairman, Tennessee

Administrative Law, O. R. McGuire, Chairman, Washington, D. C.

Labor, Employment and Social Security, William L. Ransom, Chairman, New York

Wednesday, October 1, 1941. 2:00 P.M.

SECOND SESSION

THE CHAIRMAN, presiding

Roll Call

Reading and approval of the Record

Unfinished business

Reports of Committees

Legal Aid Work, Harrison Tweed, Chairman, New York

Legal Service Bureaus, Kenneth Teasdale, Chairman, Missouri

Judicial Salaries, Walter S. Foster, Chairman, Michigan

Judicial Selection and Tenure, John Perry Wood, Chairman, California

Cooperation between Press, Radio and Bar, Giles J. Patterson, Chairman, Florida

Economic Condition of the Bar, John Kirkland Clark, Chairman, New York

Public Relations, Raymer F. Maguire, Chairman, Florida

Professional Ethics and Grievances, Orie L. Phillips, Chairman, Colorado

Unauthorized Practice of the Law, Edwin M. Otterbourg, Chairman, New York

Law Lists, Stanley B. Houck, Chairman, Minnesota

Customs Law, Albert MacC. Barnes, Chairman, New York

Securities Laws and Regulations, Talcott M. Banks, Jr., Chairman, Massachusetts

Reports of Sections

Bar Organization Activities, Burt J. Thompson, Chairman, Iowa

Junior Bar Conference, Lewis F. Powell, Jr., Chairman, Virginia

Legal Education and Admissions to the Bar, W. E. Stanley, Chairman, Kansas

Public Utility Law, George Dandridge Gibson, Chairman, Virginia

Thursday, October 2, 1941. 2:00 P.M.

THIRD SESSION

THE CHAIRMAN, presiding

Roll Call

Reading and approval of the Record

Unfinished business

Report to the House of Delegates of resolutions adopted by the Assembly for action by the House of Delegates

Consideration of Assembly resolutions

Reports of Committees

Commerce, Oscar C. Hull, Chairman, Michigan

Communications, Robert N. Miller, Chairman, Washington, D. C.

Facilities of the Law Library of Congress, Charles H. Leavy, Chairman, Washington

State Legislation, Fred T. Hanson, Acting Chairman, Nebraska

Printing, Publication and Indexing, William L. Ransom, Chairman, New York

Reports of Sections

Criminal Law, James J. Robinson, Chairman, Indiana

Judicial Administration, James W. McClendon, Chairman, Texas

International and Comparative Law, John T. Vance, Chairman, Washington, D. C.

Mineral Law, Alvin Richards, Chairman, Oklahoma

Patent, Trade-Mark and Copyright Law, Loyd H. Sutton, Chairman, Washington, D. C.

Insurance Law, Howard C. Spencer, Chairman, New York

Friday, October 3, 1941. 9:30 A.M.

FOURTH SESSION

THE CHAIRMAN, presiding

Roll Call

Reading and approval of the record

Unfinished business

Reports of Sections

Taxation, George Maurice Morris, Chairman, Washington, D. C.

Municipal Law, William C. Chanler, Chairman, New York

Real Property, Probate and Trust Law, Harold L. Reeve, Chairman, Illinois

Commercial Law, John M. Niehaus, Jr., Chairman, Illinois

Presentation of any matters which any state or local bar association or any affiliated organization of the legal profession wishes to bring before the House of Delegates

Presentation of any matters which any Section or standing or special committee of the Association wishes to bring before the House of Delegates
Report of the Committee on Hearings, Alva M. Lumpkin, Chairman, South Carolina
Report of the Committee on Draft, John Kirkland Clark, Chairman, New York
Report of the Board of Elections, Edward T. Fairchild, Chairman, Wisconsin
Report of the Committee on Credentials and Admissions, Morris B. Mitchell, Chairman, Minnesota
Unfinished business
New business

THE PRESIDENT, in the Chair

Statement of certification of nominations for officers, Harry S. Knight, Secretary, Pennsylvania
Election of officers
Presentation of incoming Chairman of House of Delegates

COMMITTEES

LEGAL AID WORK

Monday, September 29. 1:00 P.M.

Luncheon

HARRISON TWEED, Chairman, presiding

FIFTH ANNUAL OPEN MEETING OF LEGAL AID COMMITTEES OF STATE AND LOCAL BAR ASSOCIATIONS AND OTHERS INTERESTED IN LEGAL AID WORK

RESOLUTIONS

Monday, September 29. 2:00 P.M.

Formal public hearing on resolutions offered at the first Assembly session, and referred to Committee for hearing and report.
Executive meetings and further public hearings will be called and announced as occasion demands.

SECTIONS*

BAR ORGANIZATION ACTIVITIES

Tuesday, September 30. 9:30 A.M.

BURT J. THOMPSON, Chairman, presiding

Report of Chairman
Appointment of Nominating Committee
What the State and Local Bar Associations have been doing, as disclosed by the Committee on Award of Merit
Revision of the Structure of Bar Organization Activities to more nearly meet the needs of these times
A full-time Executive Secretary for any State Bar Association and how it works

2:00 P.M.

Post Admission Legal Education
What should a State or Local Bar Association concern itself with during the current emergency?
The Integrated vs. the Voluntary State Bar Association
Junior Bar Activities in State and Local Bar Associations
Responsibility of the Bar in a Changing World
Elections
Unfinished Business

*Places at which sessions will be held will be announced in the September JOURNAL.

COMMERCIAL LAW

Monday, September 29. 2:00 P.M.
Tuesday, September 30. 10:00 A.M. and 2:00 P.M.

Luncheon

Tuesday, September 30. 12:30 P.M.

The program of this Section has been omitted because of insufficient space, and will be published in full in the Advance Program for the Indianapolis Meeting, and in the September issue of the JOURNAL.

CRIMINAL LAW

Tuesday, September 30. 10:00 A.M. and 2:00 P.M.
Wednesday, October 1. 2:00 P.M.

The program of this Section has been omitted because of insufficient space, and will be published in full in the Advance Program for the Indianapolis Meeting, and in the September issue of the JOURNAL.

INSURANCE LAW

GENERAL SESSION

Monday, September 29. 2:00 P.M.

HOWARD C. SPENCER, Chairman, presiding

Address of Welcome
Response by Chairman, Howard C. Spencer, Rochester, New York
Report of Secretary, Clement F. Robinson, Portland, Maine
Appointment of Nominating Committee
Reports of Committees:
- Membership, Herbert L. Bloom, Chairman, Chicago, Illinois
- Lay Insurance Adjusters, E. Smythe Gambrell, Chairman, Atlanta, Georgia
- Unauthorized Insurance Companies, Henry S. Moser, Chairman, Chicago, Illinois
- Fraternal Insurance Law, Herman L. Ekern, Chairman, Chicago, Illinois
- Qualification and Regulation of Insurance Companies, George W. Goble, Chairman, Urbana, Illinois
- To confer with National Association of Insurance Commissioners, Hervey J. Drake, Chairman, New York City

Publications, Lionel P. Kristeller, Chairman, Newark, New Jersey (including a general discussion of the Section's Policy Annotation Program, past, present and future.)

Address: (To be announced)

Tuesday, September 30

ROUND TABLES

First Period—9:30 A.M. to 11:00 A.M.

ROUND TABLE I

AUTOMOBILE INSURANCE LAW

ROYCE G. ROWE, Chicago, Illinois, presiding

Substituted Service, by F. B. Baylor, Lincoln, Nebraska

Liability of Master for Acts of Servant, by George J. Cooper, Detroit, Michigan

Changes in Standard Provisions of Automobile Liability Policy, by Harry W. Raymond, Chicago, Illinois

ROUND TABLE II

FIRE INSURANCE LAW

THOMAS WATTERS, JR., New York City, presiding

(Topic to be announced) by Joseph G. Wood, Indianapolis, Indiana

Loss Adjustment Problems Incident to War and Defense Measures, by Frank L. Erion, Chicago, Illinois

Review of Fire Insurance Decisions During the Last Year by F. W. Davies, Birmingham, Alabama

ROUND TABLE III

AVIATION INSURANCE LAW

W. R. MCKELVY, Seattle, Washington, presiding

(Topics to be announced)

Second Period—11:00 A.M. to 12:30 P.M.

ROUND TABLE IV

HEALTH AND ACCIDENT INSURANCE LAW

OLIVER H. MILLER, Des Moines, Iowa, presiding

Total Disability in Health Insurance, by Oscar D. Brundidge, Dallas, Texas

Discussion led by F. Roland Allaben, Grand Rapids, Michigan

Hospital and Surgical Indemnities in Accident and Health Insurance, by John D. Randall, Cedar Rapids, Iowa

Discussion led by Forrest S. Smith, Jersey City, New Jersey

ROUND TABLE V

INSURANCE PRACTICE AND PROCEDURE

EUGENE QUAY, Chicago, Illinois, presiding

(Topics to be announced)

ROUND TABLE VI

FIDELITY AND SURETY INSURANCE LAW

HENRY W. NICHOLS, New York City, presiding

Federal Assignment of Claims Act of 1940, by Major Allen Wight, Dallas, Texas

Surety and Fidelity as it Pertains to Public Official Bonds, by J. S. White, Indianapolis, Indiana

Liability under Bankers and Brokers Blanket Bonds, by Frank M. Cobourn, Toledo, Ohio

Third Period—2:00 P.M. to 3:30 P.M.

ROUND TABLE VII

CASUALTY INSURANCE LAW

HUGH D. COMBS, Baltimore, Maryland, presiding

Developments in Casualty Insurance, by E. W. Sawyer, New York City

Trial and Defense of Malpractice Actions, by Leland Powers, Boston, Massachusetts

Recent Developments in the Handling of Products Liability Law, by Stanley C. Morris, Charleston, West Virginia and James M. Guiher, Clarksburg, West Virginia

ROUND TABLE VIII

MARINE AND INLAND MARINE INSURANCE LAW

ROBERT E. HALL, Hartford, Connecticut, presiding

Annotation of the Inland Marine Policy, by A. C. Charles, Joseph G. Bill and John C. Crawley of New York City

(Topics to be announced)

Fourth Period—3:30 P.M. to 5:00 P.M.

ROUND TABLE IX

LIFE INSURANCE LAW

RALPH H. KASTNER, Chicago, Illinois, presiding

Life Insurance Features of the Soldiers' and Sailors' Civil Relief Act of 1940, by W. Colquitt Carter, Atlanta, Georgia

War Clauses in Life Policies, by Tom Leeming, Chicago, Illinois

Review of Important Recent Decisions, by Stanley T. Wallbank, Denver, Colorado

ROUND TABLE X

WORKMEN'S COMPENSATION AND EMPLOYERS' LIABILITY INSURANCE LAW

THOMAS N. BARTLETT, Baltimore, Maryland, presiding

(Topics to be announced)

7:00 P.M.

ANNUAL DINNER

Floor show and music for dancing. No speeches

Wednesday, October 1. 2:00 P.M.

GENERAL SESSION

Reports of Committees holding round tables by chairmen listed above.

Automobile Insurance Law, Royce G. Rowe, Chairman, Chicago, Illinois

Fire Insurance Law, Thomas Watters, Jr., Chairman, New York City

Aviation Insurance Law, W. R. McKelvy, Chairman, Seattle, Washington

Health and Accident Insurance Law, Oliver H. Miller, Chairman, Des Moines, Iowa

Insurance Practice and Procedure, Eugene Quay, Chairman, Chicago, Illinois
Fidelity and Surety Insurance Law, Henry W. Nichols, Chairman, New York City
Casualty Insurance Law, Hugh D. Combs, Chairman, Baltimore, Maryland
Marine and Inland Marine Insurance Law, Robert E. Hall, Chairman, Hartford, Connecticut
Life Insurance Law, Ralph H. Kastner, Chairman, Chicago, Illinois
Workmen's Compensation and Employers' Liability Insurance Law, Thomas N. Bartlett, Chairman, Baltimore, Maryland

Address: (To be announced)
General discussion by members of Section on any appropriate subject (remarks limited to three minutes except by unanimous consent)
Report of Nominating Committee
Election of Officers
Adjournment

INTERNATIONAL AND COMPARATIVE LAW

Monday, September 29. 2:00 P.M.

DAVID E. GRANT, Vice Chairman, presiding

Report of the Chairman, John T. Vance
Discussion of questions relating to Military and Naval Law:
"Comparison between Military Justice and Justice in Federal and State Courts in Criminal Cases," by Archibald King, Colonel, Judge Advocate General's Dept., U. S. Army. Discussion led by Robert Wyness Millar, Chicago, Illinois

Reports of Committees:
Military and Naval Law. Major General Edward A. Kreger, U. S. A., retired, Chairman, Washington, D .C.
Cooperation with Inter-American Bar Association, George M. Morris, Chairman, Washington, D. C.
Comparative Civil and Commercial Law, Hamilton Vreeland, Jr., Chairman, Ridgewood, New Jersey

"Agreements for the Use and Operation of the Military and Naval Bases in the Western Hemisphere," by Harold Biesemeier, Commander, U. S. Navy. Discussion led by Lieutenant Commander J. J. Robinson, U. S. Naval Reserve

Reports of Committees:
Transportation and Communications, Edgar Turlington, Chairman, Washington, D. C.
Revision and Codification of U. S. Nationality and Immigration Law, F. Regis Noel, Chairman. Washington, D. C.
Comparative Public Law, J. Emmett Sebree, Chairman, Washington, D. C.
Comparative Penal Law and Procedure, J. Weston Allen, Chairman, Boston, Massachusetts
Laws relating to the Protection of American Citizens and their Property in Foreign Countries and on the High Seas. James W. Ryan, Chairman, New York City

Appointment of Nominating Committee

Tuesday, September 30. 2:00 P.M.

DR. WILLIAM C. DENNIS, President of Earlham College, presiding

Reports of Committees:
Fisheries, Territorial Waters and Exploitation of the Seas, Willard B. Cowles, Chairman, Washington, D. C.
Membership, Wilbur L. Gray, Chairman, Washington, D. C.
Report on Washington Meeting, Walter M. Bastian, Chairman, Washington, D. C.
International Double Taxation, Mitchell B. Carroll, Chairman, New York City
Publications, Brendan F. Brown, Chairman, Omaha, Nebraska

"Freedom of the Seas and Rights of Neutral Vessels," by James W. Ryan, Chairman, New York City. Discussion led by George A. Finch, Secretary, Carnegie Endowment for International Peace.

Reports of Committees:
International Law in Courts of the United States, James O. Murdock, Chairman, Washington, D. C.
Comparative Civil Procedure and Practice, Otto Schoenrich, Chairman, New York City
Comparative Social, Labor and Industrial Legislation, Robert E. Freer, Chairman, Washington, D. C.
Latin-American Law, Edwin D. Ford, Jr., Chairman, New York City

"Legal Framework of German Control of Foreign Economics." Raphael Lemkin, Lecturer in Comparative Law, Duke University Law School, former professor Universities of Warsaw and Stockholm. (Discussion leader to be announced later.)
Report of Nominating Committee
Election of Officers

Wednesday, October 1. 12:30 P.M.

Luncheon

(Reunion of Delegates to Havana Conference)

JOHN T. VANCE, Presiding

Guest speaker to be announced

JUDICIAL ADMINISTRATION

Monday, September 29. 2:00 P.M.

HONORABLE JAMES W. MCCLENDON, Chairman, presiding

"Improvement in the Administration of Justice," by Honorable John J. Parker, Charlotte, North Carolina
"Comments to the Jury by Trial Judge," by Honorable Merrill E. Otis, Kansas City, Missouri
"How to Achieve Improvement in the Administration of Justice," by Honorable George Rossman, Salem, Oregon

7:30 P.M.

ANNUAL DINNER

(Speakers and topics to be announced later)

Tuesday, September 30. 2:00 P.M.

JOINT MEETING WITH NATIONAL CONFERENCE OF JUDICIAL COUNCILS

HONORABLE EDWARD FINCH, Chairman of the Conference, presiding

Debate and discussion on the differences between the majority and minority reports of the Attorney General's Committee on Administrative Procedure. Debate leaders to be furnished.

"The Selection of Judges," by Honorable Laurance M. Hyde, Jefferson City, Missouri

JUNIOR BAR CONFERENCE

Sunday, September 28.. 9:30 A.M.

Meeting of Officers and Council

Meeting of State Chairmen and Public Information Directors, Paul F. Hannah, Washington, D. C. and Howard Cockrill, Little Rock, Arkansas, presiding.

2:00 P.M.

FIRST GENERAL SESSION

PHILIP H. LEWIS, Topeka, Kansas, Vice-Chairman, presiding

Address of Welcome, James M. Tucker, Secretary of State of Indiana

Response, Paul F. Hannah, Washington, D. C., Past Chairman of the Junior Bar Conference and National Director of Public Information

Address by General Allen W. Gullion, Judge Advocate General of the United States Army

Annual Report of National Chairman, Lewis F. Powell, Jr., Richmond, Virginia

Annual Report of National Secretary, James P. Economos, Chicago, Illinois

Report of Rules Committee

Reports and recommendations of committees:

- Activities, Howard Cockrill, Chairman, Little Rock, Arkansas
- In Aid of Small Litigant, Earl F. Morris, Chairman, Columbus, Ohio
- In Cooperation with Junior Bar Groups, Philip H. Lewis, Chairman, Topeka, Kansas
- Legislative Drafting, George F. Kachlein, Jr., Seattle, Washington
- Membership, Willett N. Gorham, Chairman, Chicago, Illinois
- Procedural Reform Studies, Paul B. DeWitt, Director in Charge, Des Moines, Iowa
- Relations with Law Students, Ross L. Malone, Jr., Chairman, Roswell, New Mexico
- Restatement of the Law, Mildred Gott Bryan, Chairman, Washington, D. C.
- By-Laws Committee, James D. Fellers, Chairman, Oklahoma City, Oklahoma

Council Recommendations

Announcement of personnel of Nominating Committee

Report of Committee on Elections. (Chairman to be announced)

Monday, September 29. 8:30 A.M.

BREAKFAST

By Council members for the State Chairmen

12:30 P.M.

LUNCHEON

Annual meeting of delegates from Junior Bar groups affiliated with the Junior Bar Conference

To be followed immediately by a business session

2:00 P.M.

Open Hearings by Resolutions Committee

4:00 P.M.

Meeting of the Nominating Committee to receive nominations

Tuesday, September 30. 9:30 A.M.

SECOND GENERAL SESSION

LEWIS F. POWELL, JR., Chairman, presiding

Address by Mr. R. D. Guy, Jr., Secretary of the Manitoba Council of the Canadian Bar Association and Vice-President of the Junior Board of Trade of Winnipeg

Report on Public Information Program, Paul F. Hannah, Director, Washington, D. C.

Discussion of the Public Information Program as a means by which the young lawyer can assist in national defense.

Completion of unfinished Sunday Program

Other unfinished business

New business

Report of the Nominating Committee and nominations from the floor

12:00 to 2:00 P.M.

Balloting by Members for election of officers and council members for ensuing year

2:00 P.M.

Meeting of Election Committee to count ballots

7:00 P.M.

DINNER DANCE

LEGAL EDUCATION AND ADMISSION TO THE BAR

Tuesday, September 30. 10:00 A.M.

W. E. STANLEY, Chairman, presiding

Report of the Chairman on the Section Activities for the year

Reports of the Chairmen of Section Committees

Discussion, "The Proposal of a Standard Bar Examination Service." Speakers to be announced

Discussion, "The Effect of the Selective Service Act on the Processes of Legal Education." Speakers to be announced
Report of the Nominating Committee
Election of Officers

2:00 P.M.

JOINT SESSION WITH THE CONFERENCE OF BAR EXAMINERS

Topic, "What Does the Future Hold for the Practicing Lawyer?"
"What Changed Conditions Must the Lawyer Face in the Practice of Law?" by the Honorable Wiley Rutledge, Jr., Justice of the United States Circuit Court of Appeals for the District of Columbia
"Wherein do the Law Schools Fail to Prepare a Law Student for the Practice?" by Joseph W. Henderson, of the Philadelphia bar
"What Changes are Practical in Formalized Legal Education?" by Dean Wilbur G. Katz, University of Chicago School of Law
Discussion from the floor

MINERAL LAW

Monday, September 29. 2:00 P.M.

ALVIN RICHARDS, Chairman, presiding

Report of Chairman
Reading of minutes and disposition of routine matters
Appointment of Nominating Committee
Reports of Committees
Address by Borden Burr, Birmingham, Alabama
(Subject to be announced later.)

Tuesday, September 30. 10:00 A.M. and 2:00 P.M.

Under Secretary of the Interior Alvin J. Wirtz, "Problems Confronting the Petroleum Industry in connection with the National Defense Program"
"Problems Relating to the Oil and Gas Industries," by Honorable Leon C. Phillips, Governor of Oklahoma
"Problems Relating to the Coal Industry"
(Speakers to be announced)
New business
Report of Nominating Committee
Election of Officers

MUNICIPAL LAW

Monday, September 29. 2:00 P.M.

JOINT MEETING WITH SECTIONS OF COMMERCIAL LAW AND TAXATION

Round Table discussion of "Sales and Use Taxes"
Discussion leaders:
Robert A. B. Cook, Boston, Massachusetts, for Section of Commercial Law
Richard Capel Beckett, Chicago, Illinois, Chairman of Committee on State Taxes, and Robert C. Brown, Bloomington, Indiana, Chairman, Committee on Local Taxes, for the Section of Taxation

Tuesday, September 30. 9:30 A.M.

Greetings from the City of Indianapolis, Honorable Michael B. Reddington, Corporation Counsel of Indianapolis
Address of the Chairman, Honorable William C. Chanler, Corporation Counsel of the City of New York, "Labor Relationships of Municipal Civil Service Employees"
Municipalities and the Defense Program:
"Economic Impact of the Defense Program on Municipal Works and Services," by Benjamin Warder Thoron, formerly Director Finance Division, Public Works Administration; presently Chief of Branch of Marketing and Operations, Division of Power, Department of the Interior
"Expansion of Municipal Services in the Norfolk, Virginia, area," by Honorable Alfred Anderson, Corporation Counsel of the City of Norfolk
"Federal Assistance to Meet Emergency Needs of Municipalities," by Benjamin Warder Thoron
Discussion by Corporation Counsel of various local governments

12:30 P.M.

LUNCHEON

Jointly with Sections of Commercial Law and Taxation

"Sales and Use Taxes," by Honorable John W. Bricker, Governor of Ohio

2:30 P.M.

"Municipal Taxes on Defense Materials and Products," by Honorable Samuel O. Clark, Jr., Assistant Attorney General, Department of Justice
"Residual Constitutional Powers of the President of the United States," by Honorable Edward H. Foley, Jr., General Counsel for the Treasury Department
"Defense Housing," by Honorable Charles F. Palmer, Coordinator, Division of Defense Housing Coordination, Office for Emergency Management
"Public Works Program," by Honorable Charles C. McCall, Special Associate General Counsel, Federal Works Agency (formerly General Counsel, Public Works Administration, and former Attorney General of Alabama and President of the National Association of Attorneys General)
Corporation Counsel and other members of the bar will have an opportunity to discuss the several papers
Committee reports

Wednesday, October 1. 2:00 P.M.

JOINT MEETING WITH SECTIONS OF REAL PROPERTY, PROBATE AND TRUST LAW, AND TAXATION

Round table discussion: "Municipal Taxation of Real Property"
Robert C. Brown of Bloomington, Indiana, Chairman of the Committee on Local Taxes, discussion leader for the Section of Taxation

PATENT, TRADE-MARK AND COPYRIGHT LAW

Monday, September 29. 1:00 P.M.

LOYD H. SUTTON, Chairman, presiding

Announcements by Hospitality Committee, Arthur M. Hood, Chairman

Discussion of Committee Reports*

- Advertising Patent Practitioners, Jo Baily Brown, Chairman, Pittsburgh, Pennsylvania
- Copyrights, Edward A. Sargoy, Chairman, New York City
- Corrective Publicity, Robert W. Wilson, Chairman, Cleveland, Ohio
- Ethics and Grievances, John D. Myers, Chairman, Philadelphia, Pennsylvania
- Legislation, Jennings Bailey, Jr., Chairman, Washington, D. C.
- Membership, Edgar F. Baumgartner, Chairman, New York City
- Patent Law Revision, John A. Dienner, Chairman, Chicago, Illinois
- Patent Office Affairs, Karl Fenning, Chairman, Washington, D. C.
- Protection of Designs, Henry W. Carter, Chairman, Toledo, Ohio
- Protection of Unpatented Ideas, Thomas E. Robertson, Chairman, Chevy Chase, Maryland
- Publication of Decisions, Stuart W. Scott, Chairman, Terre Haute, Indiana
- Relation of Invention to Employment, George H. Willits, Chairman, Detroit, Michigan
- Seizure of Patents, Chester L. Davis, Chairman, Washington, D. C.
- Trade-Marks, Wallace H. Martin, Chairman, New York City

Tuesday, September 30. 9:00 A.M.

Discussion of Committee Reports

12:30 P.M.

LUNCHEON

(Under the auspices of the International Association for Protection of Industrial Property, American Group)

(Full announcement will be made in the Advance Program and the September issue)

2:00 P.M.

Discussion of Committee Reports

Unfinished business

New business

Election of Officers

*These reports will appear in the "Committee Reports" of the Section of Patent, Trade-Mark and Copyright Law to be distributed to the members of the Section in advance of the meeting.

5:00 P.M.

COUNCIL MEETING

Brief meeting of newly elected Section Council

7:00 P.M.

ANNUAL DINNER

PUBLIC UTILITY

Monday, September 29, 1941. 2:00 P.M.

GEORGE DANDRIDGE GIBSON, Chairman, presiding

Address of Welcome, by Frederick F. Eichhorn, Chairman, Public Service Commission of Indiana

Address of Chairman

Report of Standing Committee as to Developments During the Year in the Field of Public Utility Law, Allison Choate, Chairman, New York City

Informal Discussion of the Report

Report of Committee on Methods of Improving Administrative Procedure, William Clarke Mason, Chairman, Philadelphia, Pennsylvania

Informal Discussion of the Report

Tuesday, September 30, 1941. 9:30 A.M.

"Some Current Problems under the Public Utility Holding Company Act," Honorable Robert H. O'Brien, Chairman, Director, Public Utilities Division, Securities and Exchange Commission

Informal Discussion of the Address

Report of Committee on Integration and Holding Company Act, John J. Burns, Chairman, Boston, Massachusetts

Informal Discussion of the Report

Report of Committee on Corporate Reorganizations Among the Utilities and Railroads, Honorable Roger S. Foster, Chairman, Counsel to the Public Utilities Division, Securities and Exchange Commission

Informal Discussion of the Report

2:00 P.M.

"Recent Developments in Connection with Depreciation," Honorable Nelson Smith, Chairman, New Hampshire Public Service Commission, Concord, N. H.

Symposium on Depreciation

Report of Nominating Committee and Election of Officers

7:00 P.M.

ANNUAL DINNER DANCE

REAL PROPERTY, PROBATE AND TRUST LAW

Monday, September 29, 2:00 P.M.

FIRST GENERAL SESSION

Topic, "The Effect of War Economy upon the Law."

"Emergency Governmental control of real property and building materials." Speaker to be announced later.

(a) The Governmental program
(b) Its effect upon the country's economy
(c) Signposts to lawyers

"Application of the Soldiers' and Sailors' Civil Relief Act of 1940." Speaker to be announced later

Reports of Committees:

Cooperation of State and Local Bar Associations, Eleanor S. Burr, Chairman, Boston, Massachusetts

New Members for American Bar Association and Section, Carroll G. Patton, Chairman, Minneapolis, Minnesota

Tuesday, September 30. 9:30 A.M.

REAL PROPERTY LAW DIVISION

Committee reports and discussion:

Changes in Substantive Real Property Principles, Henry Upson Sims, Chairman, Birmingham, Alabama

Real Property Financing, Harold Lee, Chairman, Washington, D. C.

Standards, Charles M. Lyman, Chairman, New Haven, Connecticut

Conveyances and Records, Margaret McGurnaghan, Chairman, Topeka, Kansas

Joint Committee with American Society of Civil Engineers, Dorr Viele, Chairman, Boston, Massachusetts

PROBATE LAW DIVISION

Committee reports and discussion:

Probate Jurisdiction and Practice, Morton J. Barnard, Chairman, Chicago, Illinois

Guardianship Administration, William M. Winans, Chairman, Brooklyn, New York

Improvement of Probate Statutes, R. G. Patton, Chairman, Minneapolis, Minnesota

TRUST LAW DIVISION

"Trusts as substitutes for wills—advantages and perils." Speaker to be announced

"War Inflation and Trust Investments." Speaker to be announced

2:00 P.M.

SECOND GENERAL SESSION

"Remittances to Foreign Beneficiaries in Countries under control of Axis Powers." Speaker to be announced

"Stranger than Fiction – Famous Handwriting Will Cases," by Albert S. Osborn

Reports of Committees:

Trust and Probate Legislation, Ralph H. Spotts, Chairman, Los Angeles, California

Trust and Probate Literature, P. Philip Lacovara, Chairman, New York City

Trust and Probate Decisions, Mayo A. Shattuck, Chairman, Boston, Massachusetts

7:00 P.M.

ANNUAL DINNER

For members, ladies and guests

"The Acquisition of the Atlantic Bases—its Legal Aspects and Significance," by the Honorable Frank Knox, Secretary of the Navy

Wednesday, October 1. 2:00 P.M.

JOINT MEETING WITH SECTIONS OF MUNICIPAL LAW AND TAXATION

For full program see page 519

Thursday, October 2

THIRD GENERAL SESSION

Business of the Section

Election of Officers

TAXATION

Monday, September 29. 2:00 P.M.

JOINT MEETING WITH SECTIONS OF COMMERCIAL LAW AND MUNICIPAL LAW

Round Table discussion of "Sales and Use Taxes"

Discussion leaders:

Robert A. B. Cook, Boston, Massachusetts, for Section of Commercial Law

Richard Capel Beckett, Chicago, Illinois, Chairman of Committee on State Taxes, and Robert C. Brown, Bloomington, Indiana, Chairman, Committee on Local Taxes, for Section of Taxation

Tuesday, September 30. 2:00 P.M.

Report of the Chairman (Section By-Laws, Article V)

Appointment of Nominating Committee (Section By-Laws, Article IV)

*Report of Committee on Federal Estate and Gift Taxes, George E. Cleary, Chairman, New York City

Report of Committee on Federal Excise and Miscellaneous Taxes, John W. Townsend, Chairman, Washington, D. C.

Papers by invited guests regarding Federal Taxes

Report of Committee on Federal Income Taxes, E. Barrett Prettyman, Chairman, Washington, D. C.

Report of Special Committee on Federal Excess Profits Taxes, Robert N. Miller, Chairman, Washington, D. C.

Report of Committee on Old Age Benefit and Unemployment Insurance Taxes, Robert C. Vincent, Chairman, New York City

Report of Advisory Committee to the United States Bureau of the Census, Homer Hendricks, Chairman, Washington, D. C.

12:30 P.M.

LUNCHEON

Jointly with Sections of Commercial Law and Municipal Law

Address by Honorable John W. Bricker, Governor of the State of Ohio

*Reports of Committees will be summarized, and not read, except by vote of the meeting. Discussion is invited from the floor not only respecting a committee's report but regarding subjects the committee should consider for the coming year.

2:00 P.M.

Report of Committee on Co-ordination of Federal, State and Local Taxes, Honorable Henry F. Long, Chairman, Boston, Massachusetts

Report of Committee on Local Taxes, Robert C. Brown, Chairman, Bloomington, Indiana

Report of Committee on State Taxes, Richard Capel Beckett, Chairman, Chicago, Illinois

Paper by invited guest

Report of Special Committee on Co-operation with State and Local Bar Association Tax Groups, William C. Warren, Chairman, New York City

Report of Special Committee on Section Functioning, G. Aaron Youngquist, Chairman, Minneapolis, Minnesota

Report of Special Committee on Membership, William C. Warren, Chairman, New York City

Report of Nominating Committee and Election of Council and Officers

Open Forum

Adjournment

Wednesday, October 1. 2:00 P.M.

JOINT MEETING WITH SECTIONS OF COMMERCIAL LAW AND REAL PROPERTY, PROBATE AND TRUST LAW

Round table discussion: "Municipal Taxation of Real Property"

Robert C. Brown of Bloomington, Indiana, Chairman of the Committee on Local Taxes, discussion leader for the Section of Taxation

THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

Monday, September 22 to Saturday, September 27, 1941

The Fifty-first Annual Meeting of the National Conference of Commissioners on Uniform State Laws will be held at the Lincoln Hotel, Indianapolis, commencing at 2:00 P.M., September 22. Because of insufficient space, further notice regarding the meetings is not published in this issue of the JOURNAL, but the program will appear in full in the September issue.

MEETINGS OF LAW SCHOOL ALUMNI ASSOCIATIONS, LEGAL FRATERNITIES, SORORITIES AND OTHER ORGANIZATIONS

Breakfast, luncheon and dinner meetings of various organizations will be held during the week of the Annual Meeting. A full schedule of such meetings will be published in the September issue of the JOURNAL.

HOTEL ACCOMMODATIONS

Indianapolis Meeting—September 29-October 3, 1941
Official Headquarters—Claypool and Lincoln Hotels

Hotel accommodations, all with private bath, are available as follows:

	Single for 1 person	Double (Dbl. bed) 2 persons	Twin-beds for 2 persons	Two-room suites (Parlor and 1 bedroom)
Antlers (750 N. Meridian)	$3.00–3.50	$4.50–5.00	$4.50–6.00	
Claypool (Wash. & Ill. Sts.)	(All space reserved)			
Columbia Club (Monument Circle)	(All space reserved)			
Harrison (Capitol & Market)	3.00–3.50	4.50–6.00	6.00	
Indianapolis Athletic Club (350 N. Meridian St.)	2.75–4.00			
Lincoln (Wash. & Ill.)	(All space reserved)			
Marott (Apt. Hotel) (2625 N. Meridian)	5.00	6.00	6.00	7.00–9.00
Severin (201 S. Illinois)	2.50–3.50	4.50–5.00	5.00	10½
Spink Arms (410 N. Meridian)	3.00	5.00	6.00	7.00
Warren (123 S. Illinois)	3.00–4.00	4.50–6.00	6.00–7.00	
Washington (34 E. Washington)	3.00–4.50	4.50–5.50		8.00

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two* persons.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating hotel, **first and second choice** of, number of rooms required and rate therefor, names of persons who will occupy the same, arrival date and, if possible, definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

The Drafting of Wills

By
PROFESSOR W. BARTON LEACH
Harvard Law School

[*Professor Leach is a well known authority on future interests. Anyone who has heard his delightful "performances" at such occasions as the Meeting of the American Law School Association knows that in addition he has a keen sense of humor and a rare talent for musical entertainment. The following is an excerpt from a discussion by him of his topic "Future Interests." It is reprinted from the April 1941 issue of the American Law School Review.*—ED.]

"And that brings us to the great case, *Colburn v. Burlingame,* 190 Cal. 697, 214 Pac. 226, 27 A. L. R. 1374. Now in that case Leslie Colburn left an estate of about $90,000 to his wife, Leora, for life and then to his brothers and sister-in-law, but with power in Leora to use the whole or any part of the principal which, in her judgment, should seem best 'for her own individual benefit and support.'

"Let me pause at this point to indicate the essential conflict in the mind of the testator. He wants Leora to have the income. He wants her to have some of the principal but not too much. He wants the remaindermen to have the principal but not so much of the principal as to interfere with the proper provision for Leora.

"In the actual case, Leora, after a decent interval, married one Merton S. Burlingame. For a short time she lived with him in Chicago, and then they moved to California, Leora and Merton living off the principal of Leslie's money. The remaindermen were somewhat incensed by this; they brought a bill in equity to enjoin this dissipation of the fund.

"Of course, the mere fact that that litigation has to be commenced and carried all the way through to the Supreme Court of California is going to produce a very substantial shrinkage of the fund. But the Supreme Court of California, moreover, said that this use of the money was quite all right. I suggest to you that we apply to that decision the usual test as to the adequacies of draftsmanship. Do we think that, if Leslie could now look down from on high and express his views, he would want the principal of that fund being used to support Merton out on the balmy shores of California? I answer that question, 'No.'

"In holding that it was all right for Leora to support Merton on Leslie's principal, the Supreme Court of California made these remarks: 'Having ample means, the not unnatural desire arises in her to remove to California, or at least to live there during a part of the year. Should she leave her husband moiling and toiling in Chicago? Presumably she concluded that it would be for her benefit that he should accompany her there.'

"At the time when I began discussing this case in the classroom I had a young man in the class named Donald McNeil, who is of the same name but not the same athletic ability as the tennis player. McNeil had already contributed a little whimsey to the classroom in verse, and, of course, you couldn't expect him to pass up this case. His commentary on it was as follows:

"Breathes there a wife with a soul so
dead
Who to her husband has not said,
'Come, my love, and stop this toiling
Cease this so plebeian moiling.

" 'Leslie's dead,
O gee, O joy,
Let's not rot in Illinois.

" 'Leslie's dead
And with his sheckles
We'll spend winters raising freckles.
So, remaindermen, we warn ya,
We are off to California.' "

Annual Conference of the Fourth Judicial Circuit

AFTER each succeeding annual meeting of the Judicial Conference of the Fourth Circuit, it has become almost traditional for the departing members to say to each other that the Conference just completed was the most successful one ever held in the Circuit. There were many such remarks made following the Eleventh Conference which was held at the Grove Park Inn at Asheville, North Carolina, on June 19-21, 1941.

Preceding the public sessions, the judges had a private session on Thursday, lasting an entire day, during which the Senior Circuit Judge reported on the action taken by the Judicial Conference in Washington and each district judge reported on conditions in his own court and his views concerning various matters under consideration. The district and circuit judges discussed, at length, the indeterminate sentence law recommended by the Judicial Conference and a resolution condemning it was passed with but a single dissenting voice. The program included an interesting address by Judge Harry Watkins of West Virginia on Selection of Jurors.

The first open session of the Conference was called to order on Friday morning, June 19th, by Judge John J. Parker, Senior Circuit Judge. Well over a hundred delegates in addition to the federal judges of the circuit responded to the roll-call by Claude M. Dean, Clerk of the Circuit Court, and the large number present attested to the success and popularity which this meeting has achieved in the Fourth Circuit. The rules under which the Conference is brought together call for attendance by all federal judges of the Circuit, by United States Attorneys, Attorneys General of the several states, representatives of the approved law schools, state bar presidents, and members of the bar designated by the various judges and by the state bar presidents.

Judge John Biggs, Jr., Senior Circuit Judge of the Third Circuit, the first speaker, discussed the creation and duties of the circuit councils in each circuit and their relation to the district courts. He was followed by Assistant Attorney General Francis J. Shea who made a persuasive statement in support of the provisions of the pending bankruptcy bill. President Jacob M. Lashly of the American Bar Association gave an eloquent picture of the task of the bench and bar in this time of national emergency to keep the wheels of justice turning in an ever more effective way.

Judge Morris A. Soper of the Circuit Court of Appeals presided over the afternoon session which was opened with the reading by United States Attorney Claud Sapp of a memorial by Judge Alva M. Lumpkin to the late Frank K. Myers, District Judge of the Eastern District of South Carolina.

Mr. Arthur T. Vanderbilt, chairman of the drafting committee appointed by the Supreme Court, led the discussion regarding the rules of criminal procedure by pointing out the difficulties involved in the drafting of the rules and by describing the extent of the task. He said that completion of a first draft is planned in time for a meeting of the committee early in September, and that it is hoped that a second draft which will be circulated to judges and lawyers will be ready by the first of the year. It is hoped the rules can be presented to the Supreme Court by the late summer of 1942 and to Congress by January 1, 1943, he said.

Reports were then made by the Criminal Rules Committees of each district by the following members:

William L. Marbury of Baltimore, Md.
John H. Hall of Elizabeth City, N. C.
Fred M. Hutchins of Winston-Salem, N.C.
Thomas J. Harkins of Asheville, N. C.
J. Waties Waring of Charleston, S. C.
C. G. Wyche of Greenville, S. C.
Armistead L. Booth of Alexandria, Va.
Homan W. Walsh of Charlottesville, Va.

James M. Guiher of Clarksburg, W. Va.
and
Arthur S. Dayton of Charleston, W. Va.

On Saturday morning, at the last session of the Conference, with United States Circuit Judge Armistead M. Dobie presiding, Judge Johnson J. Hayes of North Carolina opened the proceedings with an account of the manner in which the pre-trial conference has been used in his district. He was followed by Professor Edmund M. Morgan of Harvard who in a brilliant paper discussed the American Law Institute Code of Evidence, of which he is the reporter.

WILL SHAFROTH

Cultural Relations with South America

THE JOURNAL has received from the Department of State of the Federal Government a pamphlet entitled "The Program of the Department of State in Cultural Relations." Under authority of Congress the Department of State nominated and the President appointed a General Advisory Committee whose purpose was to advise the Department on a general policy in the planning and execution of the program of cultural relations with South American countries. The committee consists, among others, of Archibald MacLeish, Librarian of Congress, and Carl H. Milam, Secretary, American Library Association of Chicago. In response to a request from the JOURNAL, Mr. Milam has described the activities of the program of the State Department as follows:

"After many decades of relative indifference, the Government of the United States has finally begun to concern itself with international intellectual cooperation. The Department of State's interest in politics and commerce still comes first, but there is now a Division of Cultural Relations. This Division apparently grew out of a conference in Buenos Aires in December, 1936. Under the stimulus of President Roosevelt and the guidance of Secretary of State Cordell Hull, several programs were adopted at that conference for the interchange of students, professors, publications and works of art.

"The program for the exchange of students and professors has been ratified by several governments, including our own, appropriations have been made, and the exchange arrangements are in effect. A recent report listed 17 students from seven Latin American countries now enrolled in our universities as the result of this arrangement. Several of them are studying law.

"In addition to this somewhat formal interchange of students and professors, the Division has assisted with travel grants in the interchange of outstanding leaders in the fields of education, literature, journalism, music, medicine, architecture, archaeology and art. It has facilitated the interchange of educational motion pictures. It cooperated with publishers in extensive exhibits of books in three Latin American countries. It cooperates closely with the Office of the Coordinator of Commercial and Cultural Relations between the American Republics and with private agencies in all cultural fields concerned with Latin American Relations.

"The Division is not a propaganda agency with a high-sounding name. Its activities are based on the principle that sound and enduring friendship must be based on a broad foundation of understanding between peoples."

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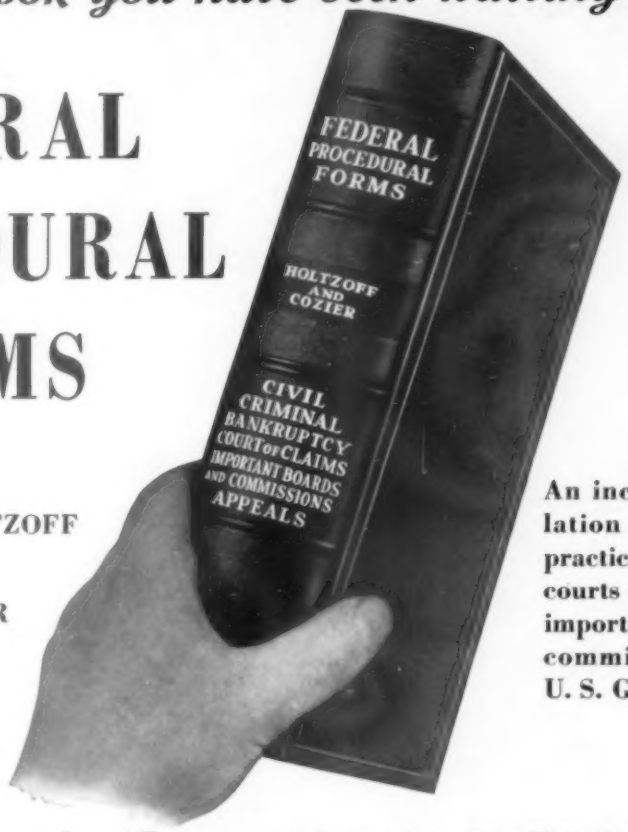

By **ALEXANDER HOLTZOFF**
Special Assistant to the Attorney General

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